U.S. Environmental Protection Agency
Office of Civil Rights

INVESTIGATIVE REPORT

for

Certain Permitting and Public Participation Practices of the Texas Commission on Environmental Quality (and its Predecessor Agencies) as Raised in Various Title VI Administrative Complaints

EPA File No. 2R-94-R6, No. 3R-94-R6, No. 5R-94-R6, No. 2R-95-R6, No. 1R-96-R6 and No. 1R-00-R6

I. INTRODUCTION

Title VI of the Civil Rights Act of 1964, as amended (Title VI) prohibits discrimination based on race, color, or national origin under any program or activity of a recipient of federal financial assistance.[1] Title VI prohibits intentional discrimination and authorizes federal agencies to adopt implementing regulations that also prohibit discriminatory effects.[2] The United States Environmental Protection Agency's Title VI implementing regulations are codified at 40 C.F.R. Part 7. Under these regulations, a recipient of EPA financial assistance may not intentionally discriminate or use policies or practices that have a discriminatory effect based on race, color, or national origin.

As provided at 40 C.F.R. § 7.120, administrative complaints alleging discriminatory acts in violation of 40 C.F.R. Part 7 may be filed with the Agency. EPA reviews accepted complaints in accordance with 40 C.F.R. Part 7, Subpart E (§§ 7.105-7.135).

This Investigative Report describes EPA's investigation and recommends that EPA dismiss the complaints under 40 C.F.R. § 7.120(g).

A. Summary of Complaints and Outcome of Investigation

As discussed in more detail below (in Section II), a number of complaints have been filed over the course of several years alleging various violations of Title VI of the Civil Rights Act of 1964 and EPA's regulations at 40 C.F.R. Part 7 by the Texas Commission on Environmental Quality (TCEQ, formerly the Texas Natural Resource Conservation Commission[3]) in the administration of its environmental permitting and public participation program. Several of these complaints raised common issues or concerns, such as a failure or refusal to take into account the "cumulative" or "additive" impact on a surrounding community of emissions from the facility being permitted in conjunction with emissions from other facilities. Others raised separate concerns with various aspects of TCEQ's permitting and public participation program, but when taken together indicated a more general concern about certain aspects of TCEQ's program (such

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[1] 42 U.S.C. §§ 2000d to 2000d-7.

[2] *See Alexander v. Choate*, 469 U.S. 287, 292-294 (1985); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 589-93 (1983).

[3] On September 1, 2002, the Texas Natural Resource Conservation Commission (TNRCC) became the Texas Commission on Environmental Quality. For consistency and ease of reference, even though the complaints covered in this investigation were originally filed prior to this most recent name change (the Texas Water Commission and Texas Air Control Board preceded TNRCC, and some of the complaints included in this investigation were originally filed alleging discrimination by these predecessor agencies), this Investigation Report generally refers to TCEQ throughout.

as a concern that TCEQ's public notice, education or outreach efforts were not sufficient to meaningfully inform potentially affected residents of proposed actions).

Most of the complaints were filed in 1994, and all but one prior to 1996. TCEQ's program (in the form of applicable policies, guidelines, legal authorities, etc.) has not remained static, and since that time a number of new authorities, policies, etc. that relate or touch on matters raised by the various complaints have been incorporated into the program. In light of the range of issues raised by the various complaints and the scope of changes or additions to TCEQ's program since that time, this Investigation focused both on the individual matters complained of, as well as a more general or "global" review of TCEQ's public participation program and practices. It concludes that many of the allegations have been addressed, in whole or in part, by subsequent changes and enhancements to the program that have already been or will be implemented (such as new authority to consider cumulative impacts in permitting). However, the results of this Investigation has also indicated that even though TCEQ has formally modified parts of its permitting and public participation program, the effectiveness of these changes "in the field" is uneven, and may require attention in the future to ensure its effectiveness. In addition, some matters or concerns raised in the various complaints are also addressed by commitments made by TCEQ for future action, as discussed in more detail in Section VI.C, below.

B. Statutory Background

Under Section 601 of Title VI,

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[4]

This section prohibits intentional discrimination.[5] In addition, Section 602 "authorize[s] and direct[s]" federal departments and agencies that extend federal financial assistance "to effectuate the provisions of section [601] . . . by issuing rules, regulations, or orders of general applicability."[6] At least forty federal agencies have adopted regulations that prohibit disparate impact discrimination pursuant to this authority.[7] The United States Supreme Court has held that such regulations may validly prohibit practices having a disparate impact on protected groups,

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[4] 42 U.S.C. § 2000d.

[5] *See Alexander*, 469 U.S. at 293; *Guardians*, 463 U.S. at 607-08.

[6] 42 U.S.C. § 2000d-1.

[7] *See Guardians*, 463 U.S. at 619 (Marshall, J. dissenting).

even if the actions or practices are not intentionally discriminatory.[8]

C. Regulatory Background - Intentional Discrimination

EPA's Title VI implementing regulations prohibit intentional discrimination:

> No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin . . . ."[9]

In addition, EPA regulations specifically provide, in part, that recipients shall not "[d]eny a person any service, aid or other benefit of the program,"[10] "[p]rovide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program,"[11] or "[r]estrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program."[12]

The Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* sets forth standards to use in assessing whether official conduct was motivated by a discriminatory purpose: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[13] To assist courts in this inquiry, the Supreme Court has identified several sources of evidence that may show racially discriminatory intent: (1) the impact of the official action – whether it "bears more heavily on one race than another;" (2) the historical background of the decision; (3) the sequence of events leading up to the challenged decision, including departures from normal procedures and usual substantive norms; and (4) the legislative or administrative history of the decision.[14]

Where direct proof of discriminatory motive is unavailable, claims of intentional

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[8] *See Alexander*, 469 U.S. at 292-94; *Guardians*, 463 U.S. at 582; *see also Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406, *reh'g denied*, 7 F.3d 242 (11th Cir. 1993).

[9] 40 C.F.R. § 7.30.

[10] *Id.*. § 7.35(a)(1).

[11] *Id.* § 7.35(a)(2).

[12] *Id.* § 7.35(a)(3).

[13] *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

[14] *Id.* at 266-68.

discrimination under Title VI may be analyzed using the Title VII burden shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[15] The elements of a prima facie case may vary depending on the facts of the complaint, but such elements often include the following:

1. That the aggrieved person was a member of a protected class;
2. That this person applied for, and was eligible for, a federally assisted program that was accepting applicants;
3. That despite the person's eligibility, he or she was rejected; and,
4. That the recipient selected applicants of the complainant's qualifications – or that the program remained open and the recipient continued to accept applications from applicants of complainant's qualifications.

If an evaluation of the direct and circumstantial evidence shows that the challenged actions were "motivated in part by a racially discriminatory purpose," the burden shifts to the recipient to provide a justification or "establish[] that the same decision would have resulted even had the impermissible purpose not been considered."[16] If the recipient can make such a showing, the inquiry must shift to whether there are any "equally effective alternative practices" that would result in less racial disproportionality or whether the or whether the justification proffered by the recipient is actually a pretext for discrimination.[17] Evidence of either will support a finding of liability.

D. Regulatory Background - Discriminatory Effects

Under Section 602 of Title VI, EPA promulgated 40 C.F.R. § 7.35(b). This section provides that an EPA funding recipient may not use criteria or methods of administering its programs and activities that have the effect of discriminating against persons based on their race, color, or national origin..[18] In accordance with this provision, recipients are responsible for ensuring that the issuance of their environmental permits does not have discriminatory effects, regardless of whether the recipient selects the site or location of permitted sources.

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[15] 411 U.S. 792 (1973); *see also Baldwin v. Univ. of Texas Med. Branch at Galveston*, 945 F. Supp. 1022, 1031 (S.D.Tex. 1996); *Brantley v. Independent Sch. Dist. No. 625, St. Paul Public Schools*, 936 F. Supp. 649, 658 n.17 (D.Minn. 1996).

[16] *Village of Arlington Heights*, 429 U.S. at 271, n.21; *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

[17] *Ellston*, 997 F.2d at 1413. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[18] *See Alexander*, 469 U.S. at 293; *Guardians*, 463 U.S. at 592 (opinion of White, J.); *id.* at 617-24 (Marshall, J., dissenting); *id.* at 642-45 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting).

In determining whether a recipient's procedures or practices have had a disparate impact on a protected group, EPA's Office of Civil Rights must evaluate the causal connection between these facially neutral procedures or practices and an alleged disparate impact on the protected group.[19] If OCR finds such a connection and finds an adverse disparate impact, the recipient may offer a "substantial legitimate justification" for the challenged practice.[20] If the recipient can make such a showing, the inquiry must shift to whether there are any "equally effective alternative practices" that would result in less racial disproportionality or whether the justification proffered by the recipient is actually a pretext for discrimination.[21] Evidence of either will support a finding of liability.

II. PERMITTING AND PUBLIC PARTICIPATION ALLEGATIONS IN TEXAS

Since 1994, a number of complaints have been filed with the U.S. Environmental Protection Agency alleging violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. (Title VI) and EPA's implementing regulations, 40 C.F.R. Part 7, by the Texas Natural Resource Conservation Commission or its predecessor agencies. Most of these allegations of discriminatory conduct concern, either in whole or in part, TCEQ's permitting activities, particularly a lack of outreach efforts to affected communities, non-responsiveness by TCEQ to community concerns, and concerns about various aspects of TCEQ's public participation process. These will be collectively referred to in this investigation report as allegations regarding the Commission's "permitting and public participation" practices, and are individually summarized below.

At all relevant times for each of the following complaints alleging Title VI violations, TCEQ has received and continues to receive EPA financial assistance and, therefore, is subject to the requirements of Title VI and EPA's implementing regulations.[22]

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[19] *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Elston*, 997 F.2d at 1407 (citing *Georgia State Conf. of Branches of NAACP v. Georgia.*, 775 F.2d 1403, 1417 (11th Cir. 1985)).

[20] *Georgia State Conf.*, 775 F.2d at 1417).

[21] *Id. See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[22] Since 1994, TCEQ and its predecessor agencies have received a large number of grants and federal assistance, totaling in the millions of dollars and too numerous to be listed here. *See, e.g.,* EPA Grant # 006450010, "Hazardous Substances Response Trust Fund" (Jul. 1, 1982, amended and extended multiple times, through Aug. 31, 2005); Grant # 996364010, "Galveston Bay Estuary Program: Implementation of the Galveston Bay Plan" (Mar. 1, 1995, amended and extended multiple times, through Aug. 31, 2002); EPA Grant # 006450010, "Particulate Matter 2.5 (PM 2.5) Ambient Air Monitoring Network" (May 7,1998, through Aug. 31, 2002).

A. (b) (6) Personal Privacy – No. 2R-94-R6

On December 30, 1993, (b) (6) Personal Privacy submitted a Title VI complaint alleging discrimination in the permitting of a proposed incinerator to be constructed by American Envirotech, Inc. in the Channelview area near Houston, Texas. The complaint specifically alleged that the permitting of the AEI facility by TCEQ and its predecessor agency (the Texas Air Control Board) failed to take into account cumulative exposures of air emissions to which minority residents living in the area would be exposed, because the "Rollins environmental commercial toxic waste incinerator is less than three miles from the AEI site," and that "any added pollution [would] significantly deteriorate the already poor to non-existent quality of our air."[23] Although the permit was issued, to date the facility has not been built.

The allegation that the additional air emissions from the proposed AEI facility would have a disparate impact on a protected class in the Channelview area would, if true, violate EPA's regulations implementing Title VI of the Civil Rights Act prohibiting discrimination on the basis of race, color or national origin. Specifically, the allegation that the failure of TCEQ's permitting process to take into account and respond to concerns regarding cumulative sources of emissions in the Channelview area would have a disparate impact on the nearby community would, if true, violate 40 C.F.R. § 7.35(b) on the basis that TCEQ's environmental program would be administered in a way that has the "effect of subjecting individuals to discrimination."

B. Garden Valley Neighborhood Association – No. 3R-94-R6

On March 22, 1994, a complaint alleging a Title VI violation was filed by the Garden Valley Neighborhood Association, a community group of residents near Austin, Texas, in response to TCEQ's permitting of a Texas Industries, Inc. facility to dry sand and gravel obtained from nearby sand pits (a "rotary aggregate dryer"), to blend the sand and gravel with Portland cement trucked in from off-site to produce bagged concrete mix, and to bag other products (sand, mortar mix, sand mix). Specifically, the complaint EPA accepted for investigation was stated as follows:

> "[W]e are complaining to you of failure by TNRCC officials to give recognition, merit or real consideration to community concerns about the growing disproportionate environmental hazards in southeast Travis County, which was ignored during [the] TNRCC permit review of a Texas Industries, Inc. application

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[23] Letter from (b) (6) Personal Privacy to EPA's Office of Civil Rights (Dec. 30, 1993) (filing allegation of Title VI violation by TNRCC). Note that the permitting entity at the time was the Texas Water Commission, and not the Texas Air Control Board. Letter from Albert M. Bronson and Amanda E. Atkinson, Assistant Attorneys General, Office of the Attorney General, Texas, to Dan Rondeau, OCR Director (Aug. 4, 1994), at 2. For these purposes, the distinction is irrelevant, as the TACB and TWC were consolidated into the TNRCC shortly after the complaint was filed.

to build a Sakrete plant near our homes. We tried to complain to the TNRCC about the siting of the TXI plant too close to a residential area."[24]

GVNA's complaint explained that "[n]eighborhood members went to two meetings with TXI and TNRCC officials to address community concerns about the new plant. Environmental inequity was brought up by citizens, but was not formally reviewed by the TNRCC in its permit decisions on the TXI plant. The TNRCC claims it has no rules or regulations to require it to address requests such as ours to review disparate environmental hazards in communities of color."[25] GVNA had previously voiced concern about the Commission's practice of looking only "'facility-by-facility' for air contaminants before granting permits," and that TCEQ "must look at the complete picture of the area surrounding the facility; the facilities already in the area; [and at] pollutants from these facilities . . .."[26]

Similar to the [redacted] allegation, the allegation that the additional air emissions from the Sakrete facility would have a disparate impact on a protected class in the GVNA neighborhood would, if true, violate EPA's regulations implementing Title VI of the Civil Rights Act prohibiting discrimination on the basis of race, color or national origin. Specifically, the allegation that the failure of TCEQ's permitting process to take into account and respond to concerns regarding cumulative sources of emissions in the GVNA neighborhood had a disparate impact on the nearby community would, if true, violate 40 C.F.R. § 7.35(b) on the basis that TCEQ's environmental program would be administered in a way that has the "effect of subjecting individuals to discrimination."

Only the allegation of a failure to respond to community concerns of cumulative impacts in the permitting process is addressed in this investigation report (the allegation of actual exposure to disproportionate levels of air emissions from multiple facilities has been investigated separately[27]).

C. Mothers Organized to Stop Environmental Sins – No. 5R-94-R6

On June 7, 1994, the Mothers Organized to Stop Environmental Sins (MOSES), a

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[24] Letter from Dan J. Rondeau, Director, EPA Office of Civil Rights, to Anthony Grigsby, Executive Director, TNRCC)Apr. 21, 1994) (notifying TNRCC of EPA's acceptance of GVNA's complaint).

[25] Letter from Barbara Adkins, President, GVNA, and Robert Meek, to Carol Browner, EPA Administrator (Mar. 22, 1994) (filing Title VI complaint).

[26] *Id.*

[27] *See* U.S. EPA Office of Civil Rights, Investigative Report for Title VI Complaint File No. 3R-94-R6 (Dec. 9, 2002); *see also* Section VII.B, *infra*.

community group representing residents of Winona, Texas, filed a complaint alleging discrimination by TCEQ in the operation of the Gibraltar Chemical Resources facility (later owned and operated by American Ecology), which disposed of hazardous waste in an underground injection well. The complaint alleged that TCEQ allowed the facility to operate in a non-compliant manner (a broad-based claim of a failure to enforce or appropriately respond to violations), as well as a failure to act on community-identified concerns with the facility by failing to use citizen-generated evidence of violations at the facility.

Specifically, with respect to permitting and public participation, the complaint alleged that "TNRCC allowed MOSES and the community no meaningful participation in enforcement actions," particularly citing the Commission's failure "to rely on the abundant corroborating [citizen-generated] evidence" of odor violations and physical impacts to supplement what MOSES alleged was insufficient evidence gathered by TCEQ inspectors, and that was missed entirely due to a lack of emission monitors.[28] MOSES's complaint specifically alleged that a 1992 temporary restraining order issued to Gibraltar by the Texas Attorney General in response to certain specified violations was inadequate because it "failed to cite hundreds of documented incidents of unauthorized emissions, unreported major upsets," and various other violations.[29]

The allegation that TCEQ's failure to respond to community concerns by not using citizen-generated evidence of violations had a disparate impact on a protected class would, if true, violate EPA's regulations implementing Title VI of the Civil Rights Act prohibiting discrimination on the basis of race, color or national origin, specifically, 40 C.F.R. § 7.35(b), on the basis that TCEQ's environmental program would be administered in a way that has the "effect of subjecting individuals to discrimination" by denying Winona residents a service or benefit of TCEQ's environmental program.

Only the permitting and public participation allegations are addressed in this investigation report (the broader failure to enforce claim was handled in a separate investigation[30]).

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[28] Letter from Mary K. Sahs, Sahs & Associates, P.C., on behalf of MOSES, to Ann Goode, Director, EPA Office of Civil Rights (July 23, 2001) [hereinafter "MOSES Supplemental Complaint"].

[29] Letter from Frances E. Phillips, Gardere & Wynne, L.L.P., on behalf of MOSES, to Daniel J. Rondeau, Director, EPA Office of Civil Rights (June 7, 1994) [hereinafter "MOSES Title VI Complaint"], at 4. MOSES's supplemental complaint included a chart listing nearly 300 citizen complaints of odors, drawn from TACB and TNRCC records, at the former Gibraltar facility from 1982 to 1994. Supplemental Complaint, Appendix 9 ("Odor Nuisance Complaints and Agency Responses").

[30] *See* U.S. Environmental Protection Agency, Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-94-R6 (Dec. 9, 2002); *see also* Section VII.C, *infra*.

D. People Against Contaminated Environments, et al. (Corpus Christi) – No. 2R-95-R6

On April 23, 1996, EPA accepted for investigation two of the allegations filed by the People Against Contaminated Environments (PACE), the American GI Forum of Texas (AGIT) and the League of Latin American Citizens (LULAC), concerning TCEQ's permitting and enforcement practices at facilities in the Corpus Christi area. Specifically, with respect to permitting and public participation, the accepted allegation was:

> "From August 1994 to the present, the TNRCC has 'skewed' the operation of its Air program permitting process in favor of industry with respect to the receipt, review and granting of air pollutant permits resulting in an adverse discriminatory impact on the minority residents in Census tracts 4, 5, 6, 7 and 11 as stated in the 1990 Census."[31]

The underlying complaint described the air permitting process as "skewed" because TCEQ had issued a large number of air permits to facilities in the industrial area of Corpus Christi but "fail[ed] to inform the public in the industrial neighborhoods of environmental hazards" to which they were being exposed, and that "people of color and low-income residents near the industrial plants have no resources to protest permit renewals and new permits, relocate from the polluted sites, retain experts, or meaningful access to the political process." The complaint further alleged that the permitting process was inadequate because the "piece-meal facility-by-facility" health effects reviews and modeling relied on by the Commission failed to take cumulative risks or exposures into account.[32]

The allegation that TCEQ's failure to respond to inform the community of permitting actions and hazards had a disparate impact on a protected class in the Corpus Christi area would, if true, violate EPA's regulations implementing Title VI of the Civil Rights Act prohibiting discrimination on the basis of race, color or national origin. Specifically, these allegations, if true, would violate 40 C.F.R. § 7.35(b) on the basis that TCEQ's environmental program would be administered in a way that has the "effect of subjecting individuals to discrimination" by denying Corpus Christi residents a service or benefit (access to public information, notice and an opportunity to participate) of TCEQ's environmental program.

Only the permitting and public participation allegations are addressed in this investigation

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[31] Letter from Dan J. Rondeau, Director, EPA Office of Civil Rights, to Grover G. Hankins, Esq. (Apr. 23, 1996) (representing PACE, AGIT and LULAC.).

[32] Letter from Grover G. Hankins, Esq. and Neil J. Carman, Ph.D. (on behalf of PACE and AGIT), to Daniel J. Rondeau, Director, EPA Office of Civil Rights (Nov. 16, 1994).

report (the allegation regarding TCEQ's failure to enforce requirements will be handled in a separate investigation).

E. People Organized in Defense of Earth and Her Resources, et al. – No. 1R-96-R6

On December 2, 1998, EPA accepted an amended complaint filed by People Organized in Defense of Earth and Her Resources (PODER) and Montopolis Area Neighborhood Improvement Council (MANIC) alleging discriminatory conduct and effects from TCEQ's use of "standard exemptions" in the permitting of the Tokyo Electron Texas, Inc. facility in Austin, Texas. Three separate allegations were accepted for investigation.

The first allegation concerned TCEQ's use of "standard exemptions" to authorize the construction of new sources of air pollution – in this case, the Tokyo Electron facility in the Austin area – without consideration by TCEQ of cumulative impacts of those emissions, which was alleged to adversely impact the nearby Hispanic population. (Certain types of facilities emitting pollutants below a certain threshold may qualify for an exemption from the air permitting process, typically without any action by the Commission.)

Second, PODER and MANIC alleged that the use of the standard exemptions was discriminatory because "the standard exemption process does not require public notice or involvement," and the lack of notice adversely impact the nearby Hispanic community. In this case, a permit application had been filed by Tokyo Electron that would have required the use of air scrubbers and establishing emission limits, but the application was later withdrawn by the facility and the emissions authorized under applicable standard exemptions.

Finally, the public's "ability to participate meaningfully in the permitting process" was alleged to be denied because of the Commission's practice of granting permits "before the resolution of appeals of denials of Texas Open Records Act requests . . .."[33] In this case, PODER's request for confidential information it sought in connection with the proposed permit had been denied. Because the permitting process and associated deadlines were not stayed while PODER's appeal of the denial was pending, PODER alleged that it was adversely affected because it did not have access to relevant public information during the permitting process.

The allegation that TCEQ's failure to take cumulative impacts into account, failure to inform the community of permitting actions and hazards by not providing a full notice-and-comment permitting process, and denial of public information in the permitting process had a

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[33] Letter from Ann E. Goode, Director, EPA Office of Civil Rights, to Barry McBee, Chairman, TNRCC (Dec. 2, 1998) (notifying TNRCC of EPA's acceptance of PODER's complaint); Letter from David Duncan, Sr. Attorney, TNRCC, to Ann Goode, Director, EPA Office of Civil Rights (Apr. 30, 1999) (responding to PODER's complaint).

disparate impact on {insert protected class, e.g. Hispanic} residents would, if true, violate EPA's regulations implementing Title VI of the Civil Rights Act prohibiting discrimination on the basis of race, color or national origin. Specifically, these allegations would, if true, violate 40 C.F.R. § 7.35(b) on the basis that TCEQ's environmental program would be administered in a way that has the "effect of subjecting individuals to discrimination."

F. People Against Contaminated Environments, et al. (Beaumont) – No. 1R-00-R6

On December 21, 2001, EPA accepted for investigation two allegations filed by PACE and the Sierra Club Lone Star Chapter, in connection with the approval of a Hydrocracker Upgrade permit amendment for Exxon-Mobil's Beaumont, Texas refinery. Specifically, with respect to permitting and public participation, PACE alleged that the opportunity for a contested case hearing was denied when TCEQ "circumvented" the 30-Day public notice and comment period through the use of federally required refinery emission decreases as offsets.[34] The allegation that TCEQ's failure to provide residents notice of the opportunity to request a hearing had a disparate impact on a protected group in the Beaumont area would, if true, violate 40 C.F.R. § 7.35(b) on the basis that TCEQ's environmental program would be administered in a way that has the "effect of subjecting individuals to discrimination" by denying Beaumont residents a service or benefit (notice and an opportunity to participate) of TCEQ's environmental program.

Only the public participation allegation is addressed in this investigation report (the allegation regarding a claim of adverse health impacts from increased emissions from Exxon-Mobil's refinery is being handled separately[35]).

G. Summary of Permitting and Public Participation Complaints

The discriminatory conduct or effects complained of in TCEQ's permitting and public participation process concern the following specific issues or topics:

- A failure of the permitting process to take into account or respond to community concerns regarding cumulative exposures or risks from multiple sources of pollution ([redacted], GVNA, PACE (Corpus Christi), PODER).

- A failure to conduct public outreach or to inform the public of hazards or otherwise assist and enable communities to meaningfully participate in the

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[34] Letter from Roy Malveaux, PACE Exec. Director, et al., to Ann E. Goode, OCR Director, EPA (Apr. 13, 2000), at 4-5 (Title VI complaint).

[35] *See* Section VII.F, *infra*.

permitting process (PACE (Corpus Christi)).

- A denial of the means for citizen and community concerns to be raised (through the use of "standard exemptions") in connection with permitting new sources of air pollution (PODER), or by denying the opportunity for a hearing (PACE (Beaumont)).

- A failure to provide for meaningful public participation by approving contested permits while appeals for denial of public information are pending (PODER).

- A failure to respond to citizen and community concerns by not responding to or using citizen-generated evidence of violations in enforcement (MOSES).

III. POSITION STATEMENT FROM THE RECIPIENT

Because this investigation covers multiple individual complaints filed over a period of several years, TCEQ has submitted separate position statements responding to several of the specific allegations. The portions of the individual position statements relevant to permitting and public participation allegations are summarized below (as noted above, some of the complaints included allegations concerning matters other than permitting and public participation, which are the subject of separate investigation reports). In addition, and as described below in Section IV, EPA in 2001 initiated a general review of TCEQ's public participation and permitting program. As part of this review, EPA submitted a broad-based information request regarding TCEQ's public participation and permitting program generally, which also included numerous specific aspects of the program of particular relevance to the allegations (many of which were several years old at the time of the broader inquiry). TCEQ's response to this broad-based information request is included in this section, as the position statement relevant to the allegations of discrimination that are covered by this investigation.[36] In a few cases TCEQ did not submit a separate response to older individual complaints, but included in its broad-based response its position statement for those older complaints. Similarly, because the PACE (Beaumont) complaint regarding permitting and public participation was accepted for investigation after this investigation was initiated, TCEQ's position statement relevant to that complaint was included in its response to the broad-based information request.

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[36] Letter from Stephanie Bergeron, Director, Environmental Law Division, to John Fogarty. EPA Title VI Task Force (Jul. 31, 2002) ("TNRCC Response to EPA Information Request Relating to Investigation of Title VI Complaints Regarding TNRCC Public Participation and Permitting Practices and Procedures") [hereinafter "TNRCC Public Participation Response"].

A. (b) (6) Personal Privacy No. 2R-94-R6

On August 4, 1994, TCEQ responded to the allegation of discrimination filed by Ms. (b) (6) Personal Privacy.[37] At the time of the response by TCEQ, the permit was in litigation. Harris County had challenged the permit (joined as intervenors by Houston and a citizen's group, the North Channel Citizens Against Pollution), and the State was joined by AEI as a defendant-intervenor. AEI shareholders brought a separate lawsuit, involving breach of a merger agreement and failure to finance or construct the facility; the merger had been sought by AEI in order to finance construction of the incinerator. A hearing in the Harris County-led litigation on a motion to remand the permit to TCEQ and reopen the proceedings on the issue of whether AEI had the financial capacity to construct, operate and close the facility was scheduled for the day after TCEQ's response to the Title VI complaint (*i.e.*, the permitting process was not yet complete at the time the complaint was accepted for investigation).[38]

With respect to the Title VI complaint, TCEQ's response stated that it raised "a number of technical matters that were considered and resolved during the permit application and hearing process," and therefore the Title VI response would focus on the siting and permitting process.[39] With respect to the proposed facility's location, TCEQ noted that it was in an area zoned for heavy industry and was part of a 14-acre industrial park generating millions of tons of hazardous waste annually. The facility would be located approximately in the middle of the industrial park, and approximately 1½ to 2 miles from the nearest residences (4 households, according to the 1990 Census), conforming to a State requirement that the facility be no closer than ½ mile to an established residence, school, park, day care center, public water supply, or church, and was

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[37] Letter from Albert M. Bronson and Amanda E. Atkinson, Assistant Attorneys General, Office of the Attorney General, Texas, to Dan Rondeau, OCR Director (Aug. 4, 1994) (response to complaint).

[38] *Id.* at 2-3.

[39] TCEQ's response also included a number of litigation-derived defenses or assertions intended to suggest that an investigation of the complaint was unnecessary or unwarranted, including that the complainant "fail[ed] to state that she is a member of a minority group" and therefore "lack[ed] standing to bring a complaint under Title VI," that the complaint must fail because it is only a "generalized grievance . . . shared by a large class of citizens of Channelview" and therefore not cognizable under Title VI, and that the complainant cannot state a "cause of action" because she is not a "direct beneficiary" of Federal funding, among others. *Id.* at 3-4, 11-12, 13. As a general matter, the jurisprudential considerations of whether a litigant has legal "standing" or states a "cause of action" sufficient to invoke a court's jurisdiction are largely inapplicable to a non-adversarial Title VI investigative proceeding such as this one (b) (6) Personal Privacy is not a "plaintiff," TCEQ is not a "defendant," and this investigation is not a trial-type adversarial litigative proceeding. So long as the requirements of 40 C.F.R. Part 7 are met, EPA may undertake a citizen-initiated investigation. *See Federal Maritime Comm'n v. South Carolina Ports Auth.*, No 01-46, slip op. at 23 (U.S. May 28, 2002) (distinguishing between adversarial trial-type proceedings and Federal agency investigations undertaken "upon its own initiative or upon information supplied by a private party").

otherwise compatible with the use of land immediately adjacent to the facility.[40] TCEQ, however, did not select the site.

TCEQ defended its permitting process as both protective racially neutral, noting in particular that a "detailed Health Effects Review," including air dispersion modeling of the facility's emissions, was performed in the case of the proposed AEI facility. Potential impacts on nearby residents and sensitive populations were also taken into consideration, and the Commission's response noted that the facility must meet other requirements to ensure protectiveness (e.g., monitoring, use of Best Available Control Technology, demonstration that the facility will achieve performance requirements, etc.).[41] TCEQ concluded that "only if . . . the proposed facility will not pose a danger to the human health is the facility permitted."[42] However, TCEQ's response, and the permitting process, focused solely on the impacts of emissions from the proposed AEI facility, and did not address the allegation that AEI facility's emissions, in combination with those from other nearby facilities, would result in an adverse, discriminatory impact.[43]

B. Garden Valley Neighborhood Association – No. 3R-94-R6

On July 13, 1994, TCEQ submitted its response to the complaint filed by GVNA. TCEQ's response focused principally on the permitting record and what it termed "the impact of public participation" on the permitting of the Sakrete facility. The Commission characterized the concerns raised by the community as focusing on the direct impacts of the facility itself: "the potential nuisance effect of dust" and silica from facility operations, concerns regarding "the health effects of cement using waste-derived fuels," and "traffic and safety problems" from the construction and operation of the facility" (which TCEQ stated was "beyond [its] statutory authority").[44] The response did not address the allegation that TCEQ's permitting process failed to take into account the impact of air emissions from multiple sources during the permitting of

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[40] Letter from Albert M. Bronson and Amanda E. Atkinson, Assistant Attorneys General, Office of the Attorney General, Texas, to Dan Rondeau, OCR Director (Aug. 4, 1994), at 4-5.

[41] *Id.* at 6-7, 9-11.

[42] *Id.* at 7.

[43] TCEQ's response also included a discussion of the extensive public notice and public participation proceedings, including individual notice by mail as well as general notice of the proposed permitting action, several well-attended public meetings and hearings, and extended time period for public comment. TCEQ noted that the complainant did not appear to have taken advantage of or participated in these proceedings, nor were the concerns raised in the Title VI complaint raised during the permitting process. *Id.* at 7-10, 12.

[44] Letter from Anthony Grigsby, TNRCC Executive Director, to Dan Rondeau, OCR Director (Jul. 13, 1994), at 3.

the TXI Sakrete facility,

C. Mothers Organized to Stop Environmental Sins – No. 5R-94-R6

On February 27, 1995, TCEQ submitted its response to the complaint filed by MOSES in June 1994. TCEQ's response focused principally on the adequacy of TCEQ's enforcement efforts (and that of its predecessor agencies, the Texas Air Control Board and the Texas Water Commission) and followup to citizen complaints of violations at the facility.[45] With respect to the allegation of the failure of TCEQ to respond to community concerns by not using citizen-generated evidence of violations at the former Gibraltar facility in Winona, TCEQ denied the allegation. TCEQ generally disputed MOSES's characterization of the use of evidence and of the enforcement actions taken (e.g., that air monitors were installed) or that it was unresponsive to citizen concerns (noting specifically that the type of air monitors installed at Gibraltar were selected after consultation with a Citizens Advisory Committee established under the terms of a 1993 enforcement order for the purpose of assisting in the development and implementation of a "long-term complete environmental audit," and that members of MOSES participated in the Committee's discussions).[46] With respect to the allegation that the 1992 enforcement action failed to cite "hundreds" of violations that had been identified at the facility,[47] TCEQ's 1995 response stated that MOSES failed to "identify any of those 'documented incidents'" and provided "no explanation as to who documented those 'incidents' or when those 'incidents' were documented."[48] TCEQ also generally invoked the concept of "prosecutorial discretion" in its evaluation of available evidence and determination of violations upon which its enforcement actions were based.

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[45] As noted above, MOSES's allegations of an inadequate enforcement response by TCEQ at the former Gibraltar facility was investigated separately.

[46] Letter from Kenneth Ramirez, Deputy Director, Office of Legal and Regulatory Services Division, TNRCC, to Daniel J. Rondeau, Director, EPA Office of Civil Rights (Jun. 7, 1995), at 7, 8. MOSES stated in its Supplemental Complaint characterized the participation that was allowed as mere "lip service" by TCEQ, that "the State did nothing to defray the expense of that participation" on the advisory committee, and that the facility and TCEQ ignored the committee-endorsed recommendations with the result that "the air monitoring system that was installed never provided the information or protection envisioned by the community . . .." MOSES Supplemental Complaint, at 19.

[47] MOSES Title VI Complaint, at 4; MOSES Supplemental Complaint, Appendix 9 (listing nearly 300 citizen complaints of odors, drawn from TACB and TNRCC records, at the former Gibraltar facility from 1982 to 1994).

[48] Letter from Kenneth Ramirez, Deputy Director, Office of Legal and Regulatory Services Division, TNRCC, to Daniel J. Rondeau, Director, EPA Office of Civil Rights (Jun. 7, 1995), at 8. Following TCEQ's 1995 response that MOSES did not identify the "documented incidents," in 2001 MOSES filed a Supplemental Complaint that included a long listing of TACB and TNRCC citizen complaints of odor events at Gibraltar.

TCEQ also denied that MOSES had not been allowed any "meaningful participation in enforcement actions," stating that this allegation was "completely at odds with the facts in this case."[49] TCEQ asserted that its "regional and central offices have answered questions and made their files available for copying," and that TCEQ and MOSES had agreed on a motion "to allow the participation of M.O.S.E.S. and Phyllis Glazer in the State's enforcement action against Gibraltar."[50]

TCEQ's 2002 Public Participation response also addressed the allegation regarding use of citizen-generated evidence of violations, noting that legislation passed in 2001 (H.B. 2912) authorizes the use of evidence provided by members of the public in an enforcement action. Specifically, information provided by an individual may be used to initiate or supplement an enforcement action, provided that the evidence "is of sufficient value and credibility" (i.e., the evidence must conform to legal standards for admission in court as evidence).[51]

D. People Against Contaminated Environments, et al. – No. 2R-95-R6

On June 5, 1996, TCEQ responded to the complaint filed by PACE, by requesting an extension of time in which to respond.[52] An extension until August 1, 1996 was granted by EPA,[53] and on July 31, 1996 TCEQ submitted its position statement regarding the allegation that TCEQ failed to inform the public in the Corpus Christi area of environmental hazards there or to provide meaningful opportunities to participate in the permitting process, and that the permitting process failed to take cumulative risks or exposures into account.[54]

TCEQ's response included a lengthy discussion and supporting documentation of its efforts to work with and inform residents in the Corpus Christi area of environmental concerns there, beginning in the late 1980s with respect to contaminated groundwater. The response

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[49] *Id.* at 9.

[50] *Id.* MOSES, in its Supplemental Complaint, acknowledged that it was allowed to participate in the enforcement action, but that "the State did nothing to defray the cost of that participation" and that "MOSES' attorneys were shut out of the negotiations that resulted in the final Agreed Judgment." MOSES Supplemental Complaint, at 20.

[51] *Id.* at 24.

[52] Letter from Rachel Rawlins, TNRCC Attorney, to Dan Rondeau, OCR Director (Jun. 5, 1996).

[53] Letter from Dan Rondeau, OCR Director, to Rachel Rawlins, TNRCC Attorney (Jun. 27, 1996).

[54] Letter from Jim Phillips, Deputy Director, TNRCC Office of Legal Services, to Daniel J. Rondeau, OCR Director (Jul. 31, 1996).

documented soil testing beginning in early 1994 in neighborhoods near "Refinery Row," which led to free blood testing and health studies of neighborhood residents (including door-to-door health surveys), performed in conjunction with the Texas Department of Health. Public meetings, flyers, discussion forums, and other outreach efforts were held during this time to discuss and inform residents of findings, possible health effects, the status of ongoing enforcement actions, etc. In response to public concerns raised during these outreach efforts, an air monitoring system was established for the area, consisting of a network of federal and state-required monitors, a jointly-operated system by industry, government and local residents, and, among others, monitors (including video monitors) located and operated at "citizen discretion." Periodic air sampling at "the request of concerned citizens" was also periodically performed. TCEQ's response accordingly concluded that it was both responsive to citizen concerns about environmental quality, and engaged in an extensive public outreach and education both prior to and after PACE filed its complaint.[55]

With respect to the allegation regarding "skewed" permitting beginning in August 1994 (which was alleged to disparately impact local residents on the basis of cumulative impacts because TCEQ only reviewed facility emissions in "piece-meal" fashion), TCEQ's July 1995 response stated that the allegation was not well-founded because in both permit renewals emissions decreased as a result of the permitting process. TCEQ's response indicated that there were only two permit actions during this time, and that in the first of these (regarding the Coastal Refining facility), the permit at issue required "a significant reduction of emissions and a corresponding improvement in air quality."[56] Similarly, in the case of the second permit renewal (for the Southwest Refining facility), maximum emission rates were likewise reduced for multiple pollutants.[57] Therefore, TCEQ asserted that the allegation that these permit actions resulted in adverse cumulative impacts due to increased emissions was mistaken.

E. People Organized in Defense of Earth and Her Resources, et al. – No. 1R-96-R6

On April 30, 1999, TCEQ submitted its response to the complaint filed by PODER and MANIC that had been accepted for investigation by EPA in December 1998. PODER's complaint alleged that TCEQ's use of "standard exemptions" in air permitting denied the community notice and an opportunity to participate in a facility's permitting, because standard exemptions do not require public notice, and that this practice resulted in the "clustering" of new sources of air pollution and disproportionate cumulative impacts of air emissions on minority residents. PODER and MANIC also alleged that the public's ability to participate meaningfully

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[55] *Id.* at 4-11, 13-14, 19-21.

[56] *Id.* at 46. TCEQ's response noted specifically that VOCs were reduced "in excess of 400 tons/year." *Id.*

[57] *Id.* at 46-47 & Attachment 48 ("Order Renewing Air Quality Permit No. R-3153 to Southwestern Refining Co., Inc; Docket No. 95-0431-AIR"; the permit reduced emissions of NO_2 in excess of 116 tons/year, SO_2 in excess of 416 tons/year, VOCs in excess of 45 tons/year, and PM_{10} in an amount greater than 101 tons/year. In addition, the permit set limits on previously uncontrolled emissions of CO, H_2S and ammonia).

in the permitting process was denied because of TCEQ's practice of granting permits before appeals of denials of Texas Open Records Act requests were resolved, and that this was both intentionally discriminatory and had a disparate impact on minorities.

TCEQ's response denied that the use of standard exemptions could have an adverse cumulative impact because standard exemptions are only allowed for "facilities that 'will not make a significant contribution'" of air emissions.[58] With respect to the claim that TCEQ's practice of using standard exemptions denies minority communities an opportunity to participate in the permitting of facilities, TCEQ denied that the practice was discriminatory because the use of standard exemptions "is not limited to any particular area of the state . . .."[59] Furthermore, depending on the type of standard exemption claimed by a facility, TCEQ does not itself receive notice that a facility is operating under an exemption; nor does TCEQ approve a facility's use of a standard exemption – in fact, according to TCEQ's response, it has "no discretion" to grant or deny an exemption for which a facility is qualified.[60]

TCEQ also asserted in its response that there was no disproportionate impact or a denial of public participation from the use of standard exemptions on the basis that the regulatory process used to create or amend standard exemptions was a full notice-and-comment process fully open to the public.[61]

Consequently, both because of the open public process used to establish standard exemptions, and because no notice to any member of the public is given when a facility uses a standard exemption, TCEQ concluded that "[t]here cannot be unequal treatment or discrimination per se when all groups or individuals are treated the same regardless of their race, color or national origin."[62]

TCEQ also flatly denied PODER and MANIC's allegation that, despite a regulatory prohibition on "splitting" or dividing projects in order to avoid permitting, TCEQ had nevertheless "interpreted its policies" to allow Tokyo Electron "to do just that."[63] TCEQ stated

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[58] Letter from David D. Duncan, Senior Attorney, Environmental Law Division, TNRCC, to Anne E. Goode, Director, EPA Office of Civil Rights (Apr. 30, 1999), at 3. TCEQ's response included a discussion of modeling of emissions from the Tokyo Electron facility, and of neighboring facilities, indicating no adverse effect. *Id.* at 3-5, 8-9. The response also described an ongoing "protectiveness review" of standard exemptions, begun in 1996, to ensure that the levels of emissions continued to be protective, and revising them where necessary. *Id.* at 6.

[59] *Id.* at 6-7.

[60] *Id.*

[61] *Id.* at 7.

[62] *Id.*

[63] *Id.* at 10.

that the Tokyo Electron facility had been considered as a single unit for purposes of the standard exemption.

With respect to the allegation of discrimination in the processing of requests for information under the Texas Public Information Act, TCEQ asserted that it has made "every effort to provide the Complainants with the information they requested."[64] TCEQ denied the allegation that PODER's two requests for information were "ignored," stating that "the record reflects that the TCEQ responded to both requests."[65] TCEQ stated that in October, 1995 it had sought an opinion from the Attorney General concerning the release of information Tokyo Electron had designated as confidential; in May, 1997 the Attorney General issued an opinion upholding the legality of the confidentiality claim, precluding the document's release.[66] Nevertheless, TCEQ also stated in its response that it was "aware of the difficulties faced by those seeking information regarding pending projects, and [therefore TCEQ] has modified its records handling and contested case hearing request processing systems" by adopting a policy under which the Commission will not process requests for hearings on permits until any pending requests for information have been finally decided.[67]

F. People Against Contaminated Environments, et al. (Beaumont) – No. 1R-00-R6

EPA accepted the complaint in this matter for investigation on December 27, 2001, after this investigation had begun in August, 2001. Accordingly, TCEQ provided its position statement regarding the public participation allegation in this matter[68] as part of a larger response to a broad-based EPA information request on permitting and public participation generally.[69] With respect to the allegation that the opportunity for a contested case hearing was denied for a permit amendment in which there were no changes or increase in facility emissions (or a reduction due to offsets), TCEQ stated that while a response to comments received during the public comment period is provided, no second notice of the preliminary decision (and concomitant opportunity to request a hearing) is required under Texas law in such circumstances.[70]

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[64] *Id.* at 12.

[65] *Id.*

[66] *Id. See* Tex. Gov't Code § 552.352 (criminal sanction for disclosure of confidential information).

[67] Letter from David D. Duncan, Senior Attorney, Environmental Law Division, TNRCC, to Anne E. Goode, Director, EPA Office of Civil Rights (Apr. 30, 1999), at 12.

[68] As noted above, the allegation regarding the use of standard exemptions is being investigated separately.

[69] TNRCC Public Participation Response at 21.

[70] *Id.* (citing TEX. ADMIN. CODE § 55.156 & TEX. CLEAN AIR ACT § 382.056(g)).

G. "Global" Response Regarding Permitting and Public Participation

TCEQ submitted its response to the information request on permitting and public participation issues in two parts, on June 14 and July 31, 2002.[71] TCEQ's response consisted of a 25-page response describing changes and modifications to TCEQ's permitting and public participation program, both in general and with respect to permits under specific environmental media. The response also described procedures used for notifying members of the public about proposed permit activities, methods and procedures for formally or informally responding to concerns raised by members of the public, outreach and education efforts to inform and assist members of the public to more knowledgeably participate in permitting, TCEQ efforts to assist public participation in public meeting and hearing procedures, changes or modifications to specific aspects of TCEQ's regulatory program, and related matters. Several hundred pages of supporting materials and documentation accompanied the written response. TCEQ stated in its summary that a "key component" of their program "is to encourage early participation, thus allowing ample opportunity for resolution of issues," and that TCEQ "continues to strive towards openess and fairness in its permitting process."[72] Specific aspects of TCEQ's "global" response that are relevant to the concerns raised by the various complaints are discussed in Sections V and VI, below.

IV. METHODOLOGY OF THE INVESTIGATION

As noted previously, starting in August 2001, as part of EPA's investigation into the specific allegations made in these complaints, the Agency undertook a more general review of TCEQ's permitting and public participation processes. The Agency focused specifically on the changes and modifications to TCEQ's permitting and public participation processes since 1994 which have the effect of increasing, enhancing or otherwise assisting citizens and neighborhood groups to participate in the regulatory and permitting process; that enable TCEQ to better consider and respond to citizens' concerns; and that give greater attention to the environmental and human health conditions in affected communities. EPA's investigation was comprised of the following principal activities:

- Interviews with TCEQ staff and management regarding the State's current public participation and permitting practices, including past changes and planned future modifications to the program affecting permitting and public participation practices.

- Interviews and/or correspondence with complainants regarding their complaints, including any experience(s) with TCEQ programs or activities subsequent to the time

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[71] Letter from Dan Joyner, Staff Attorney, TNRCC Environmental Law Division, to John Fogarty, EPA Title VI Task Force (Jun. 14, 2002), and Letter from Stephanie Bergeron, Director, Environmental Law Division, to John Fogarty. EPA Title VI Task Force (Jul. 31, 2002) [hereinafter "TNRCC Public Participation Response"]. The June 14 letter was a partial response that was also included and incorporated by reference in the July 31 letter.

[72] TNRCC Public Participation Response at 10.

their complaint was filed.

- Interviews with community members/community groups in Texas who have participated in or experience with TCEQ programs or activities intended to enhance public participation and involvement.

- Interviews with EPA Region VI management and staff familiar with TCEQ's conduct of public meetings on permits.

- Research and review of laws, rules and regulations, and TCEQ policies governing permitting and public participation activities.

- Analysis of position statements and responses to formal and informal information requests.

One focus of EPA's investigation was on identifying the practices and procedures of TCEQ that were the cause or source of the various complaints, whether there had been any changes or modifications to the practices or procedures (or other changes to the program) since the time that the complaints were filed, and analyzing whether and how the change(s) addressed the underlying allegations. EPA also compared the major elements of TCEQ's permitting, public participation and outreach program with the "Critical Elements for Conducting Public Participation" that are identified in the National Environmental Justice Advisory Council's "Model Plan for Public Participation."[73] EPA also analyzed whether any of the allegations concerning permitting or public participation accepted for investigation were not addressed or otherwise affected by changes to TCEQ's program since 1994, to determine what (if any) further investigation or action would be necessary or appropriate.

V. OVERVIEW OF TCEQ's PERMITTING AND PUBLIC PARTICIPATION PROCESSES

Since the time that the first of the complaints regarding TCEQ's permitting and public participation processes was filed in 1994, State legislative initiatives have provided new authorities for and directives to TCEQ, new regulations have been adopted and implemented, and new or revised policies and guidance have been developed. In addition, TCEQ has undertaken certain other programmatic measures that are specifically intended to enhance the Commission's ability to identify and respond to community concerns.

The first part of this section summarizes the significant changes affecting TCEQ's permitting and public participation processes that have been implemented (or planned to be implemented) since 1994. The second part of this section compares those elements of TCEQ's current public participation program with the "Critical Elements for Conducting Public

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[73] EPA Publication No. EPA-300-K-96-003, Feb. 2000.

Participation" that are identified in the National Environmental Justice Advisory Council's "Model Plan for Public Participation."[74] The third part of this section discusses the experience of persons who have attended public meetings and hearings on permits (complainants, other community representatives, and EPA personnel) that were interviewed as part of this investigation. Finally, the fourth part of this section discusses more particularly those aspects of TCEQ's permitting and public participation processes that are relevant to the concerns raised in specific complaints.

A. Summary of Significant Changes to TCEQ's Permitting and Public Participation Processes

This subsection provides an overview of the changes to TCEQ's permitting and public participation program since the first of the complaints covered by this Investigation was filed. As an overview, it is not intended to serve as a catalog of each and every modification to the permitting program since 1994. Instead, the following discussion focuses principally on the most significant statutory and regulatory changes affecting TCEQ's authority and procedures, as well as noteworthy policy or administrative developments, that are relevant to the concerns raised in the various complaints.

Two major legislative initiatives – H.B. 801 in 1999, and H.B. 2912 in 2001 – as well as several other less sweeping pieces of legislation, substantially altered TCEQ's authorities and practices in its permitting program. Other efforts preceded these statutory changes, however, including the reconciliation of inconsistent permitting procedures and requirements following the 1993 consolidation of the Texas Air Control Board and the Texas Water Commission, forming TNRCC, and the creation of the Environmental Equity Program and establishment of the Public Interest Counsel shortly thereafter (the roles and functions of the Environmental Equity Program and Public Interest Counsel are discussed in more detail in the following subsection, "Core Elements for Conducting Public Participation"). As discussed in the following subsection, both the intent and the effect of the Environmental Equity Program and Public Interest Counsel is to increase the level of public awareness, education, participation and to better represent the public interest in permit proceedings.[75]

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[74] EPA Publication No. EPA-300-K-96-003, Feb. 2000 [hereinafter "Model Plan"]. The NEJAC is a federal advisory committee that was established in 1993 to provide independent advice, consultation and recommendations to EPA on matters related to environmental justice. The "Model Plan for Public Participation" (Model Plan) was developed because the NEJAC "considers public participation crucial in ensuring that decisions affecting human health and the environment embrace environmental justice." NEJAC stated the Model Plan should be considered "as a tool that will enhance the public participation process [to be used by those] who may be interested in encouraging broader community participation in the environmental decision-making process." Model Plan, at 3, 7. The Model Plan is also cited as guidance for encouraging meaningful public participation and outreach in EPA's draft "Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)," 65 *Fed. Reg.* 39650, 39658 (June 27, 2000).

[75] However, as discussed in Section V.C. ("Field Experience), *infra,* there is some question about the breadth and reach of these efforts, which may impact their effectiveness. This appears to be due more to a matter of

Nevertheless, H.B. 801 and H.B. 2912 appear to have effected the most substantial structural changes to TCEQ's program in areas related to the subject matter of this investigation.[76] Prior to the enactment and implementation of these laws, notice of proposed permitting was somewhat haphazard and varied considerably by media program.[77] Air permits in particular were handled according to distinctly different procedures: while notice requirements under most media for permit applications and draft permits specified multiple newspaper publications and notice by mail to adjoining landowners,[78] only a single newspaper notice and placarding at the applicant's facility were required for air permits.[79] Similarly, while a response to public comments was required for most permits prior to issuance, no response to comments was required for air permits (although "individualized" responses, in the form of letters to commenters, while not a required part of the program, were also provided).[80]

Significant variations also existed on the ability to request an administrative hearing on a permit, based on media or type of permit, and was circumscribed according to, *inter alia*, whether the request was considered "reasonable" or not.[81] In addition, the public comment period ran concurrently with the time in which a hearing could be requested (*i.e.*, a permit provision might be included or modified in response to comment – in other words, it would not have been part of the original draft permit – and be insulated from challenge thereafter unless a person also filed a hearing request as a prophylactic measure). Even in those circumstances in which a person was able to obtain a contested case hearing, the Commission might nevertheless

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available resources than it is a design flaw. Interview with (b) (6) Personal Privacy Charlton-Pollard Neighborhood Association, Beaumont, Texas (Oct. 13, 2001) [hereinafter "Beaumont Interview"]; Letter from Grover C. Hankins, Hankins Law Firm, to John Fogarty, EPA Title VI Task Force (Sept. 11, 2002).

[76] There have been numerous legislative amendments and additions to TCEQ's program during the period in question, in addition to H.B. 801 and H.B. 2912. *See, e.g.*, H.B. 2997 (2001) (consideration of compliance history in permitting and applicant's use of environmental management system), H.B. 2518 (2001) (extension of permit notice requirements to include permit amendments and modifications), H.B. 1479 (1999) (limitations on hearing opportunities for certain permitting actions), S.B. 766 (1999) (emissions reduction program; establishment of *de minimis* emission levels and permit-by-rule requirements; enhanced permitting requirements for concrete plants), and S.B. 1298 (limitation on air modeling requirements for concrete plants), among others. While these amendments, and their implementing regulations, all address aspects of TCEQ's permitting and public participation program, H.B. 801, and H.B. 2912, and to a lesser extent S.B. 766, effected the most significant changes for matters raised in various of the Title VI complaints, and accordingly merit discussion. Even though all legislative and regulatory changes are not discussed in detail or cited in this Investigation Report, where relevant to a particular complaint such statutory or regulatory changes may be cited or discussed.

[77] *See generally* TNRCC Public Participation Response at 2-3 ("Pre-801" public participation process).

[78] *See* former 30 TEX. ADMIN. CODE Ch. 39 (rev. Jan. 8, 1997).

[79] *See* former 30 TEX. ADMIN. CODE Ch. 106 and 116 (rev. Nov. 15, 1996 and Jul. 8, 1998).

[80] 30 TEX. ADMIN. CODE § 55.25(b)(1); TNRCC Public Participation Response at 2-3.

[81] TNRCC Public Participation Response at 3.

substitute its own judgment in lieu of the ALJ's own recommended decision.[82] The ability to obtain judicial review was also circumscribed, both on the merits[83] as well as the subject matter.[84]

The implementation of H.B. 801 brought some measure of consistency to these varying procedures. With respect to notice of a proposed permit action, newspaper publication is now generally required (of both the notice of receipt of the permit application and once the application is "administratively complete") for all media programs,[85] although some variations remain, such as placarding of air permit actions at the facility.[86] Mailed notification is also provided for (there is an "open" mailing list for all interested persons[87]), and consistent standards for information to be provided were established, including information on public meetings.[88]

Public meeting and hearing procedures were likewise affected by H.B. 801 and implementing regulations. For example, the periods for public comment and in which to request a hearing no longer run concurrently but operate sequentially, providing a greater degree of public notice of proposed actions and creating opportunities for additional public hearings.[89] The post-H.B. 801 procedures generally provide for earlier public notice and allow relatively greater

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[82] 30 TEX. ADMIN. CODE § 80.251 (applicable to permit applications prior to September 1, 1999).

[83] For example, challenge must be brought within 30 days of the final ruling, must be brought by an "affected person," and various procedural "exhaustion of administrative remedies" requirements may have to be satisfied, such as having filed a motion for reconsideration of the Commission's decision. *See* former 30 TEX. ADMIN. CODE § 50.19 (rev. May 15, 1997).

[84] An affected person that failed to meet the requirements for a judicial challenge noted *supra* note 83 (such as neglecting to file a motion for reconsideration), nevertheless might be able to obtain review of the final permit, but only of the *changes* between the *draft* and *final* permit, precluding a substantive challenge to the permit itself. 30 TEX. ADMIN. CODE § 55.25(b)(3).

[85] *See, e.g.*, 30 TEX. ADMIN. CODE § 39.405 (general notice provisions); *id.* § 39.411 (text of notice); *id.* § 55.152 (standardized public comment period). Note also that while it is the applicant's responsibility to provide newspaper notice of the permit action, if the applicant fails to do so, the Commission is empowered to publish notice, or suspend the permit application. *Id.* § 39.405(a)

[86] *Id.* § 116.133 (sign posting requirements).

[87] *Id.* § 39.407.

[88] *Id.* § 39.411.

[89] Within 60 days following the close of the public comment period, the response to comments and proposed permit changes (if any) to the permit are made public and mailed to the applicant, commenters and those on TCEQ's mailing list. A request for hearing or reconsideration must be filed within the following 30 days. 30 TEX. ADMIN. CODE § 55.156.

levels of public access and input, than do pre-H.B. 801 procedures.[90]

H.B. 801 also changed the hearing and standards for participation. A request for reconsideration of a permit decision, for example, can be filed by anyone who commented (*i.e.*, the more stringent "standing"-type requirement applicable to a contested case hearing does not apply[91]), and while only "affected" persons may seek a contested hearing, the standard was broadened from its prior more restrictive standard.[92] Prior to this, TCEQ revised the rules for permit hearings, in part to remove conflicting or inconsistent requirements, and to consolidate procedural rules.[93] This was part of an effort to, *inter alia,* provide some measure of consistency amongst the various permitting programs so as to facilitate a greater level of public involvement.[94]

H.B. 2912, passed in 2001 and still in the process of being implemented, also added substantial new authority to and requirements for TCEQ's permitting and public participation program. Most significantly for purposes of this investigation, the law provided TCEQ with the authority to consider and address "cumulative risks" and directed the development of new procedures and policies "to protect the public from cumulative risks in areas of concentrated operations" and to treat already burdened areas as a "priority" for "monitoring and enforcement."[95] This aspect of TCEQ's program is still nascent.

Other significant features of H.B. 2912 include new requirements intended to provide more meaningful notice of proposed permit actions,[96] and provisions authorizing the use of evidence of violations gathered by members of the public to supplement or support entirely a

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[90] *See generally* Texas Natural Resource Conservation Commission, *HB 801 Training Notebook: Public Participation in the TNRCC Permitting Process* (Feb 4, 2000) (internal training manual). Note, however, that while H.B. 801 (along with other changes) established a revised structure and new procedures, there remains some concerns with implementation. *See* Section V.C, *infra.*

[91] *Compare* 30 TEX. ADMIN. CODE § 55.201 (requirement for reconsideration) *with* TEX. WATER CODE § 5.115 (definition of "affected person").

[92] TEX. WATER CODE § 55.201; the "personal justiciable interest" standard for determining an "affected person" is discussed in more detail in Section V.B.1.B, *infra*

[93] *See* 21 Tex. Reg. 4689, 12550 (1996).

[94] TNRCC Public Participation Response at 1-2.

[95] TEX. WATER CODE § 5.130.

[96] H.B. 2912 § 1.12, *adding* TEX. WATER CODE § 5.129 (requiring a "succinct" summary of the permit action, in addition to a more detailed description).

TCEQ-initiated enforcement action,[97] among other provisions.[98] Other legislatively-directed changes of significance prior to H.B. 2912 and H.B. 801 included S.B. 766 in 1997, which resulted in substantial revisions to TCEQ's system of "standard exemptions." Standard exemptions excluded from permitting certain types of facilities considered to be "minor" sources of emissions, and similarly exempted "minor" changes or modifications from permitting and notice requirements. Prior to the enactment of these provisions, neither the surrounding community nor TCEQ would necessarily be aware that a particular facility was operating under one or more standard exemptions.[99]

Starting in 1997, standard exemptions were converted to "permits by rule" in order to clearly bring these emissions within the scope of TCEQ's permitting program. Prior to this, TCEQ had begun a systematic review of standard exemption/permit-by-rule to determine if revisions were needed; in the first round of reviews, changes were made to 22 of the 43 exemptions reviewed. Adjustments to qualifying emission levels and other associated permit-by-rule requirements have been (and continue to be) systematically reviewed and revised based on new information, SIP revisions, public petition, and otherwise. TCEQ has estimated it will have completed a review of all permits-by-rule by 2004.[100] While a facility's ability to operate under a permit-by-rule may be more limited now than in 1994 – due to lowered qualifying emission levels, additional conditions placed on their use – many permits-by-rule still do not require registration or notice to TCEQ or members of the public; the rationale appears to be that since a permit-by-rule is authorized only for "insignificant" levels of emissions that will not "contribute[] to a condition of air pollution,"[101] there is no reason for the public or government regulators to be informed of such *de minimis* emissions.[102]

In addition to these legislatively-directed changes and enhancements, TCEQ has made other administrative changes to its permitting and public participation program, particularly in

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[97] TEX. WATER CODE §7.0025.

[98] H.B. 2912 is also significant as the "sunset" legislation authorizing TNRCC to operate through September 2013 (§ 1.02, amending 5 TEX. WATER CODE § 5.014). While note discussed in detail in text, other provisions of H.B. 2912 are relevant for enhancing TCEQ's public outreach, education and participation efforts. *See, e.g.*, H.B. 2912 §§ 1.14-1.117, *adding and amending* 5 TEX. WATER CODE §§ 5.1765-5.178 (providing for public notice and education of complaint procedures); § 1.22, *adding and amending* 5 TEX. WATER CODE §§ 5.273-5.274 (adding to technical support available to Public Interest Counsel). The legislation also changed the name of TNRCC to the Texas Commission on Environmental Quality. H.B. 2912 § 18.01(a)(1) (effective Jan. 1, 2004).

[99] Some standard exemptions/permits-by-rule require notification, *e.g.*, TEX. HEALTH & SAFETY CODE § 382.058.

[100] TNRCC Public Participation Response at 21.

[101] TNRCC Public Participation Response at 17-18.

[102] *Id.*

the area of outreach and public education services delivered through the Office of Public Assistance, the Environmental Equity Program, and Public Interest Counsel. These services are discussed in the following subsection ("Core Elements for Conducting Public Participation").

As the forgoing discussion indicates, the most visible changes to the permitting and public participation program have largely been the product of statutory directive, and are reflected in implementing regulations and associated administrative guidance and materials.[103] It appears that, for the most part, administrative reform efforts independent of legislative command have focused on broad-based resolutions[104] and efforts to provide the public with information on specific permits, the permitting process, monitoring and compliance information, and other outreach and educational materials.[105] These are noted in the following subsection.

B. Core Elements for Conducting Public Participation

Working from the premise that "[e]arly, inclusive and meaningful public involvement in

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[103] This should not be read to suggest that these are the *only* efforts undertaken by TCEQ to undertake or identify opportunities for improving the Commission's permitting-related activities, only that the most far-reaching reforms since 1994 have been accompanied by legislative changes and new authorities. There are other administrative efforts undertaken by TCEQ to identify areas for improvement. *See, e.g.,* TNRCC, *Regulatory Barriers to Community Air Toxics Improvement – FY 2002-2003 Work Plan* (Feb. 2002) (evaluation of potential deficiencies in TCEQ authority to respond promptly to address local air toxics concerns).

[104] TCEQ adopted a "Resolution on Public Participation" in 1996. Texas Natural Resource Conservation Commission, *Resolution on Public Participation* (Apr. 22, 1996) (available online at http://www.tnrcc.state.tx.us/homepgs/participation.html), and subsequently adopted additional resolutions aimed at revising elements of the permitting and public participation program. *See, e.g.,* Texas Natural Resource Conservation Commission, *Resolution Concerning the Evaluation of Hearing Requests, Docket No. 96-1508-RES* (Sep. 13, 1996); Texas Natural Resource Conservation Commission, *Resolution Concerning Dealing With the Public on Applications, Including Hearing Requests, Docket No. 96-1513-RES* (Oct. 8, 1996). The Resolutions indicated an intent to strengthen and increase its public assistance and outreach efforts, and to review and revise the program so as to increase and enhance public involvement in TCEQ proceedings.

[105] A variety of public guidance, pamphlets and materials have been developed, ranging from general information about TCEQ activities, *e.g.,* TCEQ's *Natural Outlook*, a quarterly newsletter/magazine, site-specific materials, *e.g.,* Texas Natural Resource Conservation Commission, *What you Need to Know About...the MDI, Inc. Superfund Site* (also printed in Spanish as *Lo que necesita saber sobre...el Sitio Superfondo de MDI, Inc*), and topic-specific materials, *e.g.,* Texas Natural Resource Conservation Commission & Texas Department of Health, *Lead Poisoning: What are the Sources? What are the Risks?* (GI-99 Rev. Jan. 1999) (also printed in Spanish as *El Envenenamiento con Plomo: ¿De Donde Proviene? ¿Cuales Son Los Riesgos?*). Guidance on accessing information and data contained in TCEQ databases is also publicly available. TNRCC Data Clearinghouse 512/239-DATA, TNRCC Pub. No GI-131 (rev. Apr. 2002). In addition to written materials, TCEQ has made extensive use of the internet for dissemination of materials and information on a wide variety of topics. *See, e.g.,* http://www.tnrcc.state.tx.us/permitting/waterperm/pdw/guidance.html(guidance and information on public drinking water safety); http://www.tnrcc.state.tx.us/permitting/airperm/opd/rimhmpg.htm (interpretation guidance and memoranda on air quality regulations); http://163.234.20.106/AC/nav/data/airperm_data.html (Information on pending and issued air permits); http://www.tnrcc.state.tx.us/air/monops/pollwx.html (current air monitoring data).

the permitting process will likely help to reduce the filing of Title VI complaints alleging that the public participation process for a permit [is] discriminatory,"[106] EPA's investigation compared TCEQ's permitting and public participation processes with the "critical elements" identified in the NEJAC "Model Plan for Public Participation."[107] The purpose of this comparison is qualitative in nature; the Model Plan does not and is not intended to establish minimum criteria or standards for determining Title VI compliance. Instead, it has been identified by EPA as a reference or resource that may provide useful information for recipients of EPA assistance in assessing their own Title VI activities; as such, it may provide a useful framework for assessing TCEQ's permitting and public participation processes.

1. Critical Element 1 – Preparation

A. Developing Relationships with Community Organizations. "Preparation" is defined in the Model Plan as "[d]eveloping, co-sponsoring and co-planning relationships with community organizations" as an essential element of a successful public participation process. Providing resources, co-sponsoring meetings, and sharing planning roles (decisionmaking, agenda development, goal establishment, leadership, outreach) are among the identified roles or activities.[108]

In the context of permitting, TCEQ does not appear to "co-plan" or "co-sponsor" public meetings or other public participation activities with potentially affected communities on individual permits. Instead, TCEQ's approach appears to center on providing an open forum and the means for interested members of the community to participate, and TCEQ formally takes a "neutral" stance, neither taking the side of or representing the interests of the permit applicant, nor that of the general public or particular communities.[109] The permit applicant is required to appear at the public meeting to defend its application, and two separate units of the TCEQ have been established to represent and assist the general public: the Office of Public Interest Counsel (OPIC), created in 1977, which represents the interests of the general public, and the Office of

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[106] Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance), 65 *Fed Reg.* 19650, 39658 (June 27, 2000).

[107] In addition to the "Critical Elements," the Model Plan's "Environmental Justice Public Participation Checklist for Government Agencies" [hereinafter "Government Checklist"] was also used as a basis for comparison. Model Plan at 15-18. It should be noted that this assessment is not the same as the review conducted by EPA to ensure that a State's permitting program meets applicable authorization or delegation requirements, *see, e.g.* 40 C.F.R. § 271.14 ("Requirements for permitting"), although the same kinds of issues and concerns may be covered, *See* State Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas, 63 *Fed. Reg.* 51163, 51167-71 (Sept. 24, 1998) (discussion of permitting and public participation requirements).

[108] Model Plan at 9.

[109] Interview with Jodena Henneke and Lydia Gonzalez of TNRCC (Aug. 24, 2001) [hereinafter "Aug. 24 TNRCC interview"].

Public Assistance (OPA), created in 1997, which helps individuals/groups in the permitting process.[110]

A third TCEQ organization, the Environmental Equity program (created in 1993), however, appears to largely follow the Model Plan's approach for working with communities. The Environmental Equity program is designed to "serve as a link for communications between the community, industries, and the government" and "provide an opportunity for meaningful input" into the process by low-income and minority communities often who believe that they are burdened with a disproportionate share of the state's environmental risks.[111]

The goals of the Environmental Equity program are identified as:

- to help citizens and neighborhood groups participate in regulatory processes;
- to serve as the agency contact to address allegations of environmental injustice;
- to serve as a link for communications between the community, industries, and the government;
- to ensure that agency programs that substantially affect human health or the environment operate without discrimination;
- to promote greater use and analysis of demographic information for areas surrounding proposed facilities or sites;
- to give greater attention to the environmental and human health conditions in affected minority and low-income communities; [and]
- to thoroughly consider all citizens' concerns and handle them fairly.[112]

The stated purpose of the Environmental Equity program is to "seek[] first to fully understand environmental issues as raised by the community, staff, industry, or other interested parties, and attempts to address them in an environmentally sensitive manner, consistent with

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[110] *See generally* Public Participation in Permitting, TNRCC Pub. No. GI-233 (Feb. 1998) (overview and description of permitting process in Texas, resources available to citizens interested in participating, etc.). This publication is also made available on-line at http://www.tnrcc.state.tx.us/admin/topdoc/gi/233.

[111] "The [Environmental Equity] office works to make certain that communities who believe they have been or will be adversely affected by actions of the TNRCC receive appropriate and expedient [sic – "expeditious"] action in developing suitable arrangements for all parties involved." TNRCC Public Participation Response (response to Question 1a).

[112] Public Participation in Permitting, TNRCC Pub. No. GI-233 (Feb. 1998), at 19. *Compare with* Government Checklist No. 3 (encourage community participation); No. 7 (develop relationships with community organizations); No. 8 (develop central point of contact to assist in dissemination of information, problem solving, etc.); No. 14 (efforts to increase participation of stakeholders); No. 26 (providing outreach, education and communication).

sustainable economic development."[113] It does this by seeking to "determine the nature of the problem or concern and the principal parties affected; organize meetings to provide opportunities for input by all interested parties; develop a plan of intervention or mediation; [and] negotiate or mediate mutually acceptable solutions."[114] Among the program's activities that are not strictly within the permitting process is the establishment of community liaisons, outreach efforts, dispute resolution, and providing a forum for discussion between industry representatives, TCEQ representatives and officials, local governments, and others.[115]

B. Educate the community to allow equal participation and provide a means to influence decisionmaking. TCEQ provides several avenues for individuals and groups to learn about and participate in the permitting process, including providing extensive materials available in hardcopy and on their website providing education and information about the permitting process, where to go for help, how to get involved in the permitting process,[116] an 800 number for individuals and groups to contact the TCEQ for assistance regarding permits and other environmental equity issues,[117] and providing other web-based and hard-copy materials and assistance, as well as individual assistance.[118]

As noted above, there are three distinct organizations within TCEQ dedicated to the public participation process: The Office of Public Assistance (helps individuals and groups to obtain information about how the permit process works and how they can participate); the Public Interest Counsel (intended to represent the interests of the general public, and is available to answer questions about environmental issues and public participation in contested evidentiary hearings (a formal trial-type process which may follow a public meeting), as well as to encourage citizen involvement in public hearings); and the Environmental Equity program (described

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[113] *Compare with* Government Checklist No. 22 (provide information on government's role pertaining to environmental and economic needs); No. 30 (linking environmental issues to local economic issues).

[114] Public Participation in Permitting, TNRCC Pub. No. GI-233 (Feb. 1998), at 19; *compare with* Government Checklist No. 8 (assist in resolving problems); No. 17 (concrete action to address community concerns); No. 25 (hold meetings to develop partnerships)

[115] *Compare with* Government Checklist No. 8 (assist in resolving problems); No. 12 (establishment of community advisory boards).

[116] Written materials are available directly from the TCEQ, most free of charge; many are also available on-line at http://www.tnrcc.state.tx.us/cgi-bin/exec/publications.pl. Additional assistance is also available on-line. *See, e.g.,* http://www.tnrcc.state.tx.us/homepgs/publicpart.html and http://163.234.20.106/AC/nav/resources/participation.html ("Public Participation"), http://www.tnrcc.state.tx.us/comm/opa/index.html ("Public Assistance on Permitting Issues"), and http://163.234.20.106/AC/nav/resources/participation_permitting.html ("Participation in Permitting").

[117] 1-800-687-4040.

[118] These include TCEQ's Office of Public Assistance, the Office of Public Interest Counsel, and the Environmental Equity Program, each of which provides a variety of materials, services and assistance.

above).[119]

All three have among their responsibilities and duties the provision of some degree of education and assistance to members of the public. Specifically in the context of public meetings, OPA is responsible for meeting logistics, and during meetings provides an explanation and overview of the permit and process, and also explains the "next steps" in the process following the public meeting. It also is required to respond in writing to public comments received at public meetings.[120] The Public Interest Counsel is a party to all TCEQ proceedings, and is directed to specifically "focus its efforts on providing greater assistance to citizens who are challenging actions of the agency."[121] In addition, OPIC's role is to ensure "that all relevant evidence on environmental, public, or consumer-related issues is developed and made part of the record for the commission's consideration."[122] The Environmental Equity program (as noted above) is available to work with local communities to encourage participation in public meetings, to and help prepare for their participation.

However, factors militating against the objective to afford the community an equal and meaningful opportunity to influence decisionmaking include: (1) public meetings are not routinely held or required for every permit; they must be requested (although TCEQ personnel are available to assist[123]), although the Commission may on its own decide to hold a public meeting on a permit; (2) To be part of the formal record, public comments must be formally submitted (i.e., those raised during the "informal discussion" period of a public meeting are not considered),[124] although TCEQ personnel are available to assist with this, as well[125]; (3) At least

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[119] Note that the Environmental Equity program is formally a part of the Office of Public Assistance. TNRCC Public Participation Response (response to Question 1a).

[120] 30 TEX. ADMIN. CODE § 55.25(a) - (b); Aug. 24 TNRCC Interview.

[121] TNRCC Resolution on Public Participation (Apr. 22, 1996). *See generally* TEX. WATER CODE §§ 5.271 - 5.275 (authority and duties of Public Interest Counsel). On its website, OPIC further states that its role is to "encourage[] public participation in the commission's decision-making process and [to] bring[] public interest concerns to the attention of the commission on behalf of citizens affected by a particular application." *See* http://www.tnrcc.state.tx.us/comm/pic/index.html.

[122] *Id.*

[123] Aug. 24 TNRCC Interview.

[124] 30 TEX. ADMIN. CODE § 55.152 (Public Comment Period; "comments must be filed with the chief clerk"); *see generally* 30 TEX. ADMIN. CODE 55.25 (Public Comment Processing); TNRCC Public Participation Response (response to Question 1c); Aug 24 TNRCC Interview.

[125] Aug. 24 TNRCC Interview. New guidance on this and other aspects of public participation, and assistance provided by TCEQ to members of the public, is being drafted. *See* "Public Participation in Environmental Permitting Under House Bill 801," at 10 (draft June 3, 2002) (listing TCEQ organizations and services, and types of assistance provided).

for "Federal Operating Permits" under the Clean Air Act), "only comments pertaining to whether the permit provides for compliance with the federal operating permit regulation" will result in changes to a permit;[126] and (4) TCEQ will apparently only consider matters that are within its jurisdiction (e.g., traffic concerns are referred to DOT, but not otherwise considered by TCEQ).[127] Similarly, cumulative impacts analysis is limited – cross-media impacts are not generally considered, as the only media considered are those that are covered by the permit. TCEQ asserts that it has no authority to go beyond review of the individual permit before it.[128]

With respect to formal challenges to proposed permits (an administrative trial-type "contested evidentiary hearing" before an administrative law judge), access to the process by members of the public/communities is more limited. While any member of the public can submit comments, object to, comment on, etc., proposed permits in public meetings, only persons with a "personal justiciable interest" may legally challenge a permit.[129] In a contested trial-type hearing before an ALJ, the "personal justiciable interest" standard functions as a type of standing requirement serving to limit the number of parties to those who have a personal interest in or would be affected by the permit.

The standard has three components. First, it must be *personal:* the challenged permit must have a direct, personal impact, affecting an interest not shared with the public in general. Second, it must be *justiciable:* it must be within the regulatory authority and jurisdiction of the TCEQ. Third, there must be a concrete *interest:* the impact of the proposed activity under consideration would impair or deny a right to the "advantages accruing from [one's] property or . . . individual use of an adjacent natural resource."[130]

While somewhat limiting, the standard nevertheless appears reasonably broad and on its face would (or should) include local communities that would be potentially (adversely) affected by the facility's operations, in particular the requirement that the interest be personal appears to encompass those who have a personal stake in the outcome – specifically, those who would, for

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[126] 30 TEX. ADMIN. CODE § 122.340(m).

[127] Aug.24 TNRCC Interview; Interview with Jodena Henneke, Troy McCoy, Laurel Carlisle, Anne Inman, and Arnoldo Medina of TNRCC (Dec. 4, 2001) [hereinafter "Dec. 4 TNRCC interview"]. *See also* U.S. Environmental Protection Agency Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 3R-94-R6 (Garden Valley Citizens Association Complaint), at 7 n.29 (referring concerns regarding traffic safety state department of transportation); *compare with* Government Checklist No. 21 (establish interagency working groups to address environmental justice issues).

[128] Aug. 24 and Dec. 4 TNRCC Interviews.

[129] *See* 5 TEX. WATER CODE § 5.115(a).

[130] Public Participation in Permitting, TNRCC Pub. No. GI-233, at 10 (Feb. 1998) ("What is a personal justiciable interest?").

example, suffer adverse consequences from facility operations – and excludes as a direct party those who have no direct stake or interest (i.e., would not be personally affected) but who are seeking to represent more generalized or larger public interests. In Texas' system, the broader public interest is represented by the Public Interest Counsel, who by law is a mandatory party to the proceeding.[131] The third element, that the activity would impair or deny a right or advantage accruing from one's own property or use of a resource, appears to constrict the zone of protected interests, but on its face would (or should) encompass use of resources such as air and water. Persons or communities claiming an adverse impact by exposure to pollutants affecting these resources they use should qualify as parties under this standard.[132]

Even where a person does not have a personal interest and is not qualified as a party, provisions are still made for such individuals to be heard through the submission of public comment or statements: as described by TCEQ, while such public statements "are not considered as evidence, [they] instead assist the judge and parties in determining the nature of the public concerns so that appropriate evidence relating to those concerns may be raised during the proceeding."[133]

This standard for challenging administrative permit actions before an ALJ is similar to the federal (constitutional) standing requirement articulated in *Baker v. Carr*,[134] and later applied

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[131] 5 TEX. WATER CODE § 5.115(a) ("An interest common to members of the general public does not qualify as a personal justiciable interest."); *id.* § 5.271 (Public Interest Counsel "promotes the public's interest" and is "responsive to citizens' concerns [regarding] environmental quality"); *id.* § 5.273 ("The [public interest] counsel shall represent the public interest and be a party to all proceedings before the commission.").

[132] Interview with Jodena Henneke and Bridget Bohac of TNRCC (Oct. 23, 2001) [hereinafter "Oct. 23 TNRCC interview"]. TCEQ has also explained that this standard is "less restrictive" than the pre-H.B. 801 standard, and "has resulted in more hearing requests being granted by the Commission." TNRCC Public Participation Response at 5-6. *See also* HEAT Energy Advanced Tech., Inc. v. West Dallas Coalition for Environmental Justice, 962 S.E.2d 288 (Tex. App. 1998) (ruling in favor of broad view of associational standing), *cited with approval in* State Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas, 63 *Fed. Reg.* 51163, 51171 n.5 (Sept. 24, 1998) ("Although it was not necessary for EPA to review the standing requirements of the evidentiary hearing process, the Agency notes with approval the recent Texas Court of Appeals decision in [Heat Energy Advanced Technology] regarding standing in the evidentiary hearing process under the 'affected person' provisions of 30 TAC section 55.29.").

[133] "Participating in the Contested Evidentiary Hearing," in Public Participation in Permitting, TNRCC Pub. No. GI-233, at 11 (Feb. 1998). *See also* State Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas, 63 *Fed. Reg.* 51163, 51170 (Sept. 24, 1998) ("[EPA] believes that another significant safeguard that provides assurances that comments will be properly considered is that prior to final entry of the settlement a judge (in a civil action) or the administrative law officer or commissioners must approve a settlement. (See TWC Sec. 7.075) *These officials normally have broad authority to take notice of any fact or information, including public comments, to ensure that any settlement they recommend or sign is in the public interest and not contrary to law or statute*. This is certainly the case in the federal courts.") (emphasis added).

[134] 369 U.S. 186 (1962).

in the environmental context in *Sierra Club v. Morton*[135] and in cases involving claims of discrimination in *Warth v. Seldin*[136] The standard requires that a person have a "personal stake" in the outcome, that a person suffer a "distinct and palpable" injury from the challenged conduct, and that there is a causal nexus between the conduct and the injury. EPA has previously examined this standard and found it consistent with the federal standard.[137]

Finally with respect to access to contested hearings, while an attorney is recommended by TCEQ to represent a person or group challenging a permit in a contested hearing, one is not required.[138] OPA and OPIC are also noted to be available to assist citizens in preparing for a challenge.[139] Alternative Dispute Resolution is provided as an alternate means to resolve challenges or concerns with proposed permits, and is intended as a mechanism to allow other less-costly means to participate and be heard where there are concerns.[140]

C. Regionalize materials to ensure cultural sensitivity and relevance. Materials do not appear to be specifically "regionalized" as suggested in the Model Plan, on the basis that in Texas language is more of an issue of concern for ensuring that citizens are informed of permitting actions.[141] As noted above, for all permit applications, materials are provided about the proposed permit at the local library, county courthouse, or other publicly-available location. These materials include the permit application, other information about the facility and operations, etc., as well as contact information and guidance on how a public meeting can be requested (note that in some circumstances, such as permitting new landfills, public meetings are

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[135] 405 U.S. 727 (1976). *See also Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).

[136] 422 U.S. 490 (1975).

[137] State Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas, 63 *Fed. Reg.* 51163, 51170-71 (Sept. 24, 1998).

[138] "Participating in the Contested Evidentiary Hearing," in Public Participation in Permitting, TNRCC Pub. No. GI-233, at 10 (Feb. 1998).

[139] Oct. 23 TNRCC interview.

[140] *See generally* "Alternative Dispute Resolution," in Public Participation in Permitting, TNRCC Pub. No. GI-233 (Feb. 1998). A brief overview of the use of alternative dispute resolution in the permitting context is available on TCEQ's website, at http://www.tnrcc.state.tx.us/comm/adr/adr.html, and TCEQ has also established an "Alternative Dispute Resolution" office that reports directly the Commissioners, and is charged with assisting applicants and those challenging permits. *See also* 30 TEX. ADMIN. CODE §§ 40.1 *et seq.* (alternative dispute resolution procedures).

[141] Model Plan at 9; *compare with* Government Checklist No. 9 (regionalize materials to ensure "cultural sensitivity and relevance"; make information readily available and understandable); No. 10 (make information available in a timely manner). Note that cultural, religious or other events are taken into account with respect to when meetings are held. *See* Section V.B.3.*B*, *infra.*

mandatory).[142] By law, bi-lingual notices and information regarding permits are made available.[143] Other materials are usually provided at the public meeting; and will vary based on the nature of the permit and facility operations.[144]

D. Provide a facilitator who is sensitive and trained in environmental justice issues. The Environmental Equity program appears to undertake a number of facilitator-like activities (e.g., dispute resolution, community-industry-TCEQ liaison, etc.). Facilitators are trained in environmental issues (through the NEJAC), and training in environmental justice issues is mandatory for TCEQ employees.[145] In particular, one of the Environmental Equity program's functions is "to increase [TCEQ] staff awareness about environmental equity and justice issues. . . . [T]he program encourages technical staff to consider that the environmental programs they develop for businesses also affect the communities living around those businesses."[146] Specifically with respect to public meetings on permits, trained OPA staff serve as meeting facilitators, and additionally arrange for Environmental Equity staff to be present at meetings "when the surrounding community is predominantly minority or low income."[147]

2. NEJAC Element 2 – Participants

A. Involvement of community groups. The Model Plan suggests that following communities should be involved in environmental justice issues: Community and neighborhood groups, community service organizations (health, welfare, and others), and religious and spiritual communities; educational institutions and academia; environmental and other non-governmental organizations; government agencies (federal, state, county, local, and tribal industry and

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[142] 30 TEX. ADMIN. CODE § 39.501(e)(1) ("If the application proposes a new facility, the agency *shall* hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application.") (emphasis added); Aug. 24 and Oct. 23 TNRCC Interviews.

[143] *See, e.g.*, 30 TEX. ADMIN. CODE § 39.603(d) ("Alternative language newspaper notice" applicable to air permits); *id.* § 122.322 ("Bilingual Public Notice" for Federal Operating Permits). TCEQ provides information on its website in Spanish, at http://www.tnrcc.state.tx.us/informacion, as well as hardcopy materials in Spanish. *See, e.g.*, "El Envenenamiento con Plomo," TNRCC Pub. No. GI-69 (Jan. 1999) (pamphlet on lead poisoning). *Compare with* Government Checklist No. 9 (translate documents for limited English-speaking population).

[144] Aug. 24 and Oct. 23 TNRCC Interviews.

[145] Oct. 23 TNRCC Interview; *compare with* Government Checklist No. 24 (provide staff trained in cultural, linguistic and community outreach techniques).

[146] "Activities," in Environmental Equity (TCEQ website description of Environmental Equity program, at http://www.tnrcc.state.tx.us/comm/opa/envequ.html); *see also* "Environmental Equity," in Public Participation in Permitting, TNRCC Pub. No. GI-233, at 19 (Feb. 1998).

[147] TNRCC Public Participation Response (response to Question 2a).

business; medical community.[148]

As noted above, the Environmental Equity program has among its express purposes to identify and work with community groups and organizations, and to assist in their participation in the permitting and rulemaking process, to work with community, government and industry to provide opportunities to identify and address concerns, and to intervene or mediate on particular matters to resolve issues.[149]

However, specifically with respect to permitting particular facilities, TCEQ does not actively seek out and provide notice to community organizations and other affected groups in communities near the facility. Instead, it relies on traditional notice mechanisms (newspaper notices, posted signs) and direct notice to those individuals or groups that have previously requested to receive TCEQ notices.[150] The approach adopted by TCEQ appears intended to provide communities and groups with education and assistance to enable them to be knowledgeable and better participate, while leaving it to the individuals or groups to decide whether or not to avail themselves of the notice and other mechanisms made available by TCEQ (e.g., website, direct notice, etc.).[151]

B. Identify key stakeholders. The Model Plan also suggests that certain "key stakeholders" – educational institutions, affected communities, policy and decisionmakers, etc. – be sought out in order to enhance public participation.[152] As noted above, while the Environmental Equity program performs a community outreach function, with respect to permitting TCEQ does not affirmatively identify and solicit and inform particular community

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[148] Model Plan, at 9.

[149] *See supra* Section V.B.1. TNRCC Public Participation Response (response to Question 1a) ("[Environmental Equity] Staff establish a dialogue with communities primarily through field visits and individual and group meetings, which include participation in public meetings to discuss pending permits applications that affect minority or low income residents.").

[150] Aug. 24 and Oct. 23 TNRCC Interviews; *see also* 30 TEX. ADMIN. CODE § 39.407. *Compare with* Government Checklist No. 2 (ensuring early and meaningful public participation); No. 4, 5, 6, 7 & 8 (identify and provide external stakeholders opportunity for input; work with communities to learn concerns; solicit early involvement; develop relationships with community organizations).

[151] Aug. 24 TNRCC Interview. *See also* TNRCC, *A Resolution Concerning Public Participation at the TNRCC* (Apr. 22, 1996) ("The Commission shall strengthen its public assistance and outreach activities to provide greater responsiveness to the public and additional opportunities for public participation; The Commission . . . directs the Public Interest Counsel to focus its efforts on providing greater assistance to citizens who are challenging actions of the agency; . . . The Commission directs staff to review rules and policies . . . to ensure that the public has knowledge of and can participate to the fullest extent allowed by law in all matters which affect them.").

[152] Model Plan, at 10.

groups or "key stakeholders" of specific permitting actions[153] (except to the extent that the individual(s) or group(s) has already requested to be on TCEQ's mailing list of permit activities[154]).

3. NEJAC Element 3 – Logistics

A. Location. The Model Plan suggests that accessibility to public meetings be "maximized" (*i.e.*, access to public transportation, provision of child care, and access for persons with disabilities, etc. should be considered); that the meeting be held in an adequate facility (size and conditions must be considered); and to make use technologies for more effective communication (*e.g.*, teleconferences, language/translation, equipment).[155]

TCEQ generally seeks to hold permit meetings as close to the facility as practical; TCEQ typically relies on school facilities, on the basis that they are generally of a size sufficient to accommodate attendees, are upgraded to meet Americans with Disability Act standards, are located in or near population centers or affected communities and therefore tend to be close to residents, and provide good access to public transportation. Translators/bilingual staff are provided.[156] Meetings are recorded to capture all comments made.[157] Handouts and equipment to assist in presentation are available on an as-needed basis.

B. Timing. The Model Plan suggests that the time of both the day and year should be considered when scheduling public meetings, so as to accommodate the needs of affected communities (*i.e.*, evening and weekend meetings to accommodate working people, scheduling to avoid conflicts with other community or cultural events, etc.).[158] TCEQ usually schedules permit meetings in the evenings (although they may be held at other times, on request), usually starting at 7 p.m., and usually run for 2 to 3 hours. Meetings are typically *not* held on the same day as local community and cultural events, religious or other holidays.[159] If more time is needed

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[153] Aug. 24 and Oct. 23 TNRCC Interviews. *Compare with* Government Checklist No. 4 (identify key stakeholders and solicit input); No. 6 (solicit stakeholder input early in process).

[154] 30 TEX. ADMIN. CODE § 39.407 ("Mailing Lists").

[155] Model Plan, at 10.

[156] TNRCC Public Participation Response (response to Question 2a); Aug. 24 and Oct. 23 TNRCC Interviews. *Compare with* Government Checklist No. 13 (schedule meetings in locations and at facilities that are local, ADA compliant, provide translators, etc.).

[157] 30 TEX. ADMIN. CODE § 55.154(d) ("A tape recording or written transcript of the public meeting shall be made available to the public."); Oct. 23 TNRCC Interview.

[158] Model Plan at 10.

[159] TNRCC Public Participation Response (response to Question 2a).

for a particular meeting, such as to discuss issues or to respond to comments raised during the meeting, additional meetings may be scheduled.[160]

C. How. The Model Plan suggests that an atmosphere of "equal participation" be created at meetings (*e.g.,* avoid "head table" or "panel" approaches), and to begin with a "planning and education" session. The Plan also suggests that community members and government representatives should share leadership and presentation assignments.[161]

In preparing for permit meetings, TCEQ staff attempt to avoid using a stage or other similar setup, opting for a less formal and more intimate setting. The first part of the meeting consists of a series of presentations. The permit applicant is required to attend, and also attending will be a TCEQ staff attorney, toxicologist, the permit writer, and a Public Interest Counsel representative. A representative from the Environmental Equity program may also attend, as may a translator. The meeting is moderated/facilitated by an OPA representative. The OPA representative will explain the meeting's purpose and review the agenda and the order of proceedings. The applicant then makes its presentation, which is followed by an explanation by TCEQ staff concerning their role (*i.e.,* the TCEQ attorney explains the process, what happens after the public meeting, etc.; the Public Interest Counsel explains their involvement, etc.). Following this is an "open forum" of discussion and questions from the public.[162]

Following the presentation, open forum and discussion portion of the public meeting, the "Formal Comment" period begins, during which comments, concerns, etc. may be made by any member of the public. Comments made must be responded to in writing by TCEQ. Public comments on permits (as well as other TCEQ actions, such as implementation plans to address pollutants of concern in geographic areas, streams, etc.) may also be submitted directly to TCEQ (*i.e.,* public meetings are not the only forum in which community input is allowed or available).[163] As noted above, interested members of the public may also submit comments in contested evidentiary hearings on permits.

At the close of the meeting, OPA staff "wraps up" by summarizing the meeting and explaining the next steps in the process (TCEQ's objective is to explain at each step in the

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[160] 30 TEX. ADMIN. CODE § 55.156(b)(2) ("The executive director may call and conduct public meetings, . . . in response to public comment."); TNRCC Public Participation Response (response to Question 2a); Aug. 24 and Oct. 23 TNRCC Interviews. *Compare with* Government Checklist No. 13 (schedule meetings at times that do not conflict with work schedules, provide sufficient time to hear concerns, etc.).

[161] Model Plan at 10.

[162] "Public Meetings," in in Public Participation in Permitting, TNRCC Pub. No. GI-233 (Feb. 1998); Aug. 24 and Oct. 23 TNRCC Interviews.

[163] *See, e.g.,* 30 TEX. ADMIN. CODE § 55.152 ("Public Comment Period"); *id.* § 55.156 ("Public Comment Processing"); Aug. 24 and Oct. 23 TNRCC Interviews.

process where things are and what comes next). A formal response to comments is then prepared and provided to those who have requested it, including those on TCEQ's regular mailing list. The response to comments includes a cover letter, which also includes an explanation of the next steps in the process and what options are available (such as opportunities for additional meeting/comment/etc.).[164] TCEQ is also preparing new and additional outreach materials to explain permit processes detailing regulatory requirements and to encourage public participation.

4. NEJAC Element 4 – Mechanics

A. Agenda Setting and Use. The Model Plan suggests that the agenda set out clear goals for the meeting, and that a timeline should be provided that describes how the meeting fits into the overall agenda of the issues at hand. It also suggests the incorporation of "cross-cultural exchanges" in the presentation of information and in the meeting agenda, and that a professional facilitator be provided who is sensitive to, and trained in, environmental justice issues. The Model Plan also suggests that while the agenda should be referred to, meeting organizers should not be bound by it (i.e., deviate where necessary or appropriate).

TCEQ procedures provide for agendas to be set out in advance of public meetings, and together with the meeting moderator or facilitator agendas are intended to convey the order, topics and goals of the meeting. Environmental justice training is provided to TCEQ employees,[165] and an express function of the Environmental Equity program is "to increase [TCEQ] staff awareness about environmental equity and justice issues. In particular, the program encourages technical staff to consider that the environmental programs they develop for businesses also affect the communities living around those businesses." Deviations are allowed to be made, as needed.[166]

B. Followup. The Model Plan recommends that meeting follow-up include the development of an action plan and the identification of a contact person who will expedite any work products from the meeting. Minutes should be distributed to attendees, as well as a list of action items or next steps.

TCEQ procedures for public meetings on permits provide for followup consistent with the Model Plan's suggestions. Specifically, at the conclusion of the meeting, the TCEQ moderator "wraps up" by summarizing the meeting and describing the next steps in the process. Minutes of the meeting and other related materials are to be provided to those at the meeting who

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[164] Aug. 24 and Oct. 23 TNRCC Interviews. *Compare with* Government Checklist No. 17 (follow up on community meetings to address concerns raised).

[165] TNRCC Public Participation Response (response to Question 2a); Oct. 23 TNRCC Interview.

[166] Aug. 24 TNRCC Interview.

sign up, and are otherwise available through TCEQ.[167]

C. Field Experience

Interviews of a variety of persons who have attended public permitting meetings held by TCEQ tended to indicate that, while a structure is in place that would support a robust permitting and public participation process, delivery of the process in the field appears to be somewhat uneven or limited.[168] For example, TCEQ records and materials affirmatively document numerous instances in which the Environmental Equity Program has worked with communities and groups to address concerns presented by the location and operation of facilities in their area.[169] Contrasting this, however, is the experience of several community groups and/or individuals actively involved in ongoing permitting actions who, when asked, were unaware of the Environmental Equity program's existence.[170] Similarly, while TCEQ provides extensive information and resources on its website, some users found it difficult to find information on permitting activities in their area. While TCEQ provides an "800" number for in-person assistance, this too was viewed as not always a helpful or reliable resource.[171]

Similarly, TCEQ mechanisms for providing notice of permit actions (e.g., newspaper notice, posting, etc.) do not appear to be reaching their intended audience, as those mechanisms were not relied on by those interviewed for this investigation. While some citizens were on TCEQ's mailing list, it was perceived as uninformative regarding the nature of the action, issues of concern, etc., and as a result was not often relied on. In the same vein, publication of proposed actions in local newspapers was also noted as not containing enough substantive information sufficient to put people on notice of the proposed activity.[172] Instead, most indicated

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[167] *See, e.g.*, 30 TEX. ADMIN. CODE § 55.156(c) (distribution of comments); TNRCC Public Participation Response (response to Question 2a); Aug. 24 and Oct. 23 TNRCC Interviews.

[168] The discussion in this section of the experiences of those persons interviewed as part of this investigation (which included several of those who filed Title VI complaints, as well as representatives of other community groups that have not filed complaints) should be understood as anecdotal evidence of actual TCEQ practice. These interviews were conducted in order to better inform the investigation by including illustrative examples of the delivery of TCEQ's program in the field in some of the areas (Houston, Beaumont) where permitting and public participation concerns have been raised. The information provided from these interviews supplemented information provided by TCEQ, and was further supplemented by interviews of EPA staff with direct experience regarding TCEQ-conducted public meetings and outreach efforts on permitting matters.

[169] *See, e.g.*, TNRCC, *Texas Partners for Environmental Justice*, NAT. OUTLOOK, Winter 1998, at 1-2.

[170] Interview with representatives of Mothers for Clean Air - Houston and Clean Air Clear Lake, Houston Texas (Mar. 12, 2002) [hereinafter "Houston Citizen Interview"]; Interview with representatives of Charlton-Pollard Neighborhood Association (Mar. 13, 2002) [hereinafter "Beaumont Citizen Interview"].

[171] *Id.*

[172] *Id.*

that they learned of proposed permitting actions through formal or informal networks of friends, neighbors or organizations[173] (or in one case, directly from the facility itself[174]).

With respect to the conduct of public meetings on permits, while TCEQ's general practice is to "moderate" and explain the proceedings, work from an agenda, etc. (as discussed in Section V.B, above), groups and individuals interviewed for this investigation who had attended permit meetings were unaware that a formal agenda was provided, and further reported that there was not always an explanation of the plan or purpose of the meeting, of roles and responsibilities of those at the meeting (i.e., TCEQ staff, Public Interest Counsel, permit applicant, etc.), of the overall process, or where to go for assistance and additional information.[175]

In addition, TCEQ's requirement that the permit applicant attend the meeting to "defend" their application, and (sometimes) coupled with the lack of awareness of an agenda and clear explanation of the roles and responsibilities of TCEQ staff and the permit applicant, seems to have resulted in confusion by some attendees: some were unaware that there was any TCEQ representative at the permit meeting at all, or they believed that the meeting was being run by the permit applicant or that the applicant was speaking for TCEQ.[176] In other instances the presence and role of the Public Interest Counsel was unknown.[177] Some confusion was also voiced concerning how formal and informal comments were handled during meetings (principally due to a lack of a clear – or any – explanation of the process), and others expressed concern about the value of formally commenting (due to the perception that the permitting was a "done deal" because the permit applicant was speaking for TCEQ).[178]

Meeting followup was also uneven – some reported that the "next steps" in the permitting process were explained at a meeting's conclusion, but not always.[179] There was also confusion or misinformation within community groups regarding the rules on who is able to formally comment or contest a proposed permit action (some believed the standard to be that one had to

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[173] *Id.*

[174] Beaumont Citizen Interview. In this case, the facility was represented on a community group that had been established to work directly with facilities in the area and to increase lines of communication, among other objectives. Notice and discussion of a proposed permitting activity was brought to the community group in advance of formal public notice; representatives of the community group felt this was a more effective and informative manner for them to understand and raise questions or concerns, and for the facility to discuss, respond to and gather the community's input into the proposed activity.

[175] Beaumont Citizen Interview; Houston Citizen Interview.

[176] Houston Citizen Interview.

[177] Beaumont Citizen Interview; Houston Citizen Interview.

[178] *Id.*

[179] *Id.*

border the facility property line, or live within a one-mile radius of the facility).[180] None of the community or local representatives interviewed had sought assistance from, or were aware of the assistance services of the Environmental Equity Program or the Public Interest Counsel.[181]

Interviews of EPA Region VI management and staff indicated that TCEQ's permitting and public participation program has improved over the years, and the last several years in particular has seen some notable enhancements in legal authority to address several long-standing issues of concern (noting H.B. 2912 in particular). Also noted was ongoing work with TCEQ on various aspects of the program, including efforts to identify and address concerns from multiple sources or cumulative impacts.[182] With respect to the conduct of public meetings and hearings, observations of Region VI staff tend to be consistent with the descriptions summarized above (*e.g.,* TCEQ staff opened meeting with an overview and introductions, and served as a facilitator throughout, but the purpose of permit under consideration and of public participation process overall was not well explained at the outset, but was later explained more clearly after confusion was expressed by those in attendance).[183]

Response to citizen complaints about facility operations was likewise uneven. Response to odor complaints, for example, was reasonably prompt (usually within 1 to 2 hours),[184] but the odor or other event complained of often dissipated within that time.[185] In some cases, the incidences of events precipitating complaints lessened over time,[186] while in others the problems

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[180] Houston Citizen Interview.

[181] Beaumont Citizen Interview; Houston Citizen Interview.

[182] One of the current joint projects is the "Houston/Galveston Citizen Air Monitoring Project (HGCAMP)," which is a coalition of private citizens in the Houston/Galveston area, EPA Region 6, TCEQ, the Harris County Pollution Control Division, and the City of Houston. EPA, TCEQ, and Harris County officials have trained citizens to operate air sampling devices, and to collect, store and submit ambient air samples throughout the Houston and Galveston area. The project is intended to accomplish a variety of objectives, including identifying differences occurring between air samples taken by different methods, to provide citizens with a general indication of the air quality at or near their homes, and to provide the various agencies responsible for air pollution protection in the area with sampling data so that they can determine the need for strengthening air pollution protection programs and strategies in the Houston area. *See generally* http://www.epa.gov/earth1r6/6lab/hgcamp/hgcamp.htm.

[183] Notes of David Garcia, EPA Region VI (Eastman Chemical Co. Public Meeting, Longview TX, July 11, 2002).

[184] Beaumont Citizen Interview; Houston Citizen Interview.

[185] Houston Citizen Interview.

[186] Beaumont Citizen Interview.

continued apparently unabated.[187] While TCEQ procedures require notification of a complainant (if not anonymous) of the results of an investigation or action in response to a complaint,[188] citizens making complaints who were interviewed during this investigation were unaware of any followup activity by TCEQ.[189]

VI. FINDINGS OF FACT

A. Permitting and Public Participation Generally

Both the authorities and the structure of TCEQ's permitting and public participation program have changed and evolved in the years since the earliest complaint that is part of this investigation was filed. Whether borne of a general desire or recognition that processes and programs must continuously improve to meet the needs of the various communities served by TCEQ, or in response to specifically-identified shortcomings or areas in need of attention, large parts of the program have been modified and, at least in structure and intent, has adopted or now exhibits many of the elements of the Model Plan. However, the experience of those interviewed, while limited (*i.e.*, not a statistically significant sample) has tended to indicate that the delivery of the program in the field is uneven, and that certain elements are not having their intended effect. For example, the extensive information provided through the internet may not be having the desired effect of educating the public and increasing the availability of information because the website is perceived as "user unfriendly," and notice mechanisms do not appear to be consistently providing meaningful notice to potentially affected citizens of proposed actions,

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[187] Houston Citizen Interview. Those interviewed in the Houston area for this Investigation both documented and expressed a deep and long-standing concern about the effects of operations at of several facilities near their homes, particularly the American Acryl facility near Seabrook Texas, among several others in and around the Houston area. Of particular note was the frustration expressed with the response (or lack of response) to citizen complaints about facility operations – noxious odors, plant fires and explosions, concerns about excessive emissions limiting outdoor activity and creating respiratory distress, among others. Despite their efforts in making numerous complaints to TCEQ over a long period of time, the conditions complained of were reported to have continued with little or no change. The experience of these residents bears a striking similarity to that experienced by residents in and around Winona Texas in the early to mid-1990s, that was the subject of a prior Title VI investigation. *See* U.S. Environmental Protection Agency, Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-94-R6 (Dec. 9, 2002). Although there was not a violation of Title VI in that matter, the investigation did result in a "Letter of Concerns" from EPA recommending that TCEQ conduct an evaluation of its current performance in responding to problem odors from facilities, in order to determine whether any corrective measures are necessary to ensure a prompt response to citizen complaints. Letter from Karen D. Higginbotham, Acting Director, EPA Office of Civil Rights, to Robert J. Huston, TNRCC Chairman (Dec. 9, 2002) (recommendation 1).

[188] Memorandum from Debra Barber, Assistant Division Director, Administrative Support Section, Field Operations Division, TNRCC, to Regional Directors and Regional Section Managers, TNRCC, *Complaint Handling Procedures* (Jun. 15, 1999), at 3 ("All complainants will be notified of the results of the investigation. This notification must be documented.").

[189] Beaumont Citizen Interview; Houston Citizen Interview.

even among interested and motivated members of the public.[190] Past inconsistencies in the conduct of public meetings by TCEQ staff also appear to be a contributing factor to some level of public confusion or misunderstanding about the process, their ability to participate, limitations on participation, etc. A lack of awareness of the availability of TCEQ assistance also appears to be a contributing factor.[191]

While some degree of variation or inconsistency is to be expected in a broad-based program, the evidence gathered in this investigation strongly suggests that while TCEQ has in place a structure and approach that should be expected to provide for a robust public participation process, there are some difficulties in delivery and implementation, and its goal of increasing participation and awareness is not being met on a consistent basis.[192]

In contrast to implementation issues, TCEQ's structural approach to conducting public meetings may also be contributing to difficulties in the public participation process. Specifically, while the tripartite approach adopted by TCEQ for public meetings on permits (in which TCEQ serves as a "neutral," the permit applicant serves as their own advocate for the permit, and the Public Interest Counsel serves as the advocate for the general public) would appear to be a design likely to provide for the routine inclusion of a representative range of interests at meetings and ensure that TCEQ would operate as a neutral decisionmaker, in practice it may be contributing to confusion by members of the public and having the unintended effect of hampering effective public participation. As noted above, members of the public attending permit meetings were sometimes unaware of any TCEQ presence, or of the Public Interest Counsel, or limited their own participation because of the perception that the permit applicant, in its advocacy role, was in effect in charge of the meeting and that the outcome would be unaffected by any public input. While it is not possible, based on the limited sample in this Investigation, to definitively conclude that the structural approach to public meetings has this unintended consequence on a broader basis, the experience of those interviewed strongly suggests that there may be a structural (as opposed to an implementation) barrier to a more robust public participation process.

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[190] Houston Citizen Interview.

[191] Beaumont Citizen Interview; Houston Citizen Interview.

[192] At least one community representative indicated that TCEQ's apparent difficulties in this area were attributable to a lack of resources – that available staff was stretched too thinly and that this inhibited TCEQ's ability to respond to community concerns more quickly or effectively. Beaumont Citizen Interview. The experience of the citizen representatives interviewed in Houston was particularly at odds with the stated goals and intent of TCEQ's public outreach and assistance program; these members of the public cited numerous incidents where they felt that the Commission was unresponsive, if not deliberatively indifferent, to community concerns about facility operations, and that TCEQ resources were spent helping facilities obtain permits, while little to no assistance was provided to members of the public. *See, e.g.,* Letter from Tamara Maschino, et al., Clean Air Clear Lake to Governor George Bush (Feb. 28, 2000). At a minimum, the experience of these citizens illustrates the uneven delivery of TCEQ's public assistance and participation, even among interested and active community participants, and even though the structure and design of TCEQ's program appears to be well-suited for an effective program.

On the other hand, it is also clear that the existence of a separate office specifically devoted to public participation and assistance (including education and outreach), and which reports directly to the Commissioners, provides both a management focus and a programmatic emphasis on these critical issues.

B. Commitments by TCEQ

By agreement signed by TCEQ on May 30, 2003, the Commission has committed to undertake several specific actions that bear on or relate to a number of the issues raised in the various complaints that are the subject of this investigation. Specifically, TCEQ has committed in writing to the following:

Cumulative Impacts: TCEQ has agreed to enter into a Memorandum of Agreement with the U.S. EPA, Region VI, to collaborate and jointly share information relating to the further study and consideration of cumulative impacts in TCEQ's program, including (but not limited to) permitting activities, rules, and policies of both agencies. TCEQ and EPA have also agreed to coordinate on research and data collecting activities relating to the study of cumulative risks. The subject of cumulative risk evaluation and assessment is new, and this provision is intended to help ensure that EPA Region VI and TCEQ, as co-regulators, work jointly to support TCEQ's implementation of its new authority to address cumulative risks.

Public Participation and Permitting: This investigation has found that TCEQ has established a broad-based program and framework for encouraging public participation in permitting, for enhancing public awareness through outreach and education, and for responding to community concerns. However, this investigation has also identified an uneven and inconsistent delivery and effectiveness of these services, which may tend to frustrate the goals of the program (and, potentially, compliance with Title VI of the Civil Rights Act). To identify root cause(s) and impediments, and to identify opportunities for further improvements and enhancements to the program, TCEQ has committed to comprehensively assess its permitting and public participation program, to include (but not limited to):

- an assessment of the effectiveness of TCEQ's outreach and public education activities (including the effectiveness of methods of notifying the public of permitting activities, and of the citizen and community assistance resources provided by or through TCEQ);
- an assessment of how TCEQ informs the public of the use of, and potential impacts from TCEQ permitted or authorized activities, including permits-by-rule;
- an assessment of TCEQ's response to concerns raised by communities during facility permitting; and
- the identification and implementation of revisions to address issues or aspects of TCEQ's program for which a change or modification is appropriate,

Permit-By-Rule Review: TCEQ has committed to reviewing priority permit-by-rule requirements (*i.e.*, those that require registration) to ensure that the levels established for these emissions are protective, and to make any necessary revisions and modifications to these permits-by-rules to ensure their continued protectiveness.

Evidence of Violations Reported by the Public: TCEQ has committed to creating an internal review process to evaluate the effectiveness and usability of it guidance and materials for members of the public to report potential violations by facilities, and for submission of evidence of violations and sampling data for use by TCEQ in enforcement actions, or as otherwise appropriate.

The assessment of TCEQ's permitting and public participation program identifies several specific topics or areas to be covered in the evaluation. As noted above, the purpose of this evaluation is to enable TCEQ, at the conclusion of the three-year period during which the evaluation is to be conducted, to have a sense of both what is working well in its program, and what is not working well. It is hoped that the evaluation will identify any problem areas or gaps in the program, and identify the causes or barriers to the effective delivery of the program in the field. For this reason, the evaluation is also required to include recommendations for specific changes or modifications that the evaluation identifies as needed or desirable. Because the evaluation is intended to provide a roadmap or blueprint for future enhancements to the program, the Agreement specifies only broad outlines for the self-evaluation and, other than the specific topic areas noted above, does not otherwise limit TCEQ's inclusion of other topic areas or issues as part of the assessment. Similarly, since the assessment is intended to result in a useful product on which TCEQ can base future program design and/or implementation decisions, the Agreement does not specify any particular set of design or analysis protocols, inventory of elements, or other design criteria. These are left to TCEQ's discretion, in order to ensure that the assessment's design and coverage results in recommendations that are functionally well-suited for integration into TCEQ's program. TCEQ is required under the agreement to report to EPA the results of its assessment and any identified revisions or changes to the program.

The intent of the protectiveness review for priority permits-by-rule (specifically, those that require registration), which TCEQ must initiate within one year, is similar. EPA notes that TCEQ has experience in reviewing and evaluating permit-by-rule levels,[193] and the expectation is that TCEQ would draw on this experience when implementing the evaluation required by the Agreement, as well as undertaking any necessary revisions or modifications indicated by the evaluation. For this reason, and in the same manner as the permitting and public participation evaluation, the Agreement does not specify any particular evaluation procedure or criteria; TCEQ

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[193] A preliminary evaluation was conducted in 1997, and as a result of this and additional evaluations, the requirements for some permits-by-rule were identified as requiring some modifications. TCEQ has also solicited public input for the review process. *See generally* "Evaluation of Permits By Rule," at http://www.tnrcc.state.tx.us/permitting/airperm/nsr_permits/seprot/index.html.

mut also report the results of this evaluation to EPA. Similarly, the establishment of a process (within 6 months of the date of the Agreement) for evaluating the usability and effectiveness of TCEQ guidance provided to the public for reporting and submitting evidence of violations likewise does not specify particular design criteria. The purpose of these provisions is to ensure that these review processes are put in place as part of the program, in order to provide TCEQ with a process for ongoing feedback and information in order to determine whether these elements of the program are working well, or would benefit from improvements and revisions.

As noted above, TCEQ is required to report to EPA the results of the evaluations and any recommendations, within 30 days of their completion. In the event that EPA's review of a submission required to be submitted by TCEQ indicates that it does not meet the requirements of the agreement (or EPA otherwise determines potential noncompliance by TCEQ with a term or requirement of the agreement), the agreement provides that EPA will notify TCEQ in writing within 3 months of EPA's receipt of the submission (an extension may be provided for if necessary), and both parties will seek to informally resolve the disputed matter. Because an underlying purpose of the agreement is to support TCEQ's efforts to continuously improve its program overall (and thereby diminish potential noncompliance with 40 C.F.R. Part 7 in the future), it is intended that this procedure will provide for the prompt and timely identification of any concerns with actions taken (or omitted) by TCEQ, and for EPA and TCEQ to work to amicably resolve those concerns in a non-adversarial manner.

A copy of the agreement, which is a public document, is attached to this Investigation Report.

C. Specific Complaints

1. (b) (6) Personal Privacy – Cumulative Impacts

The (b) (6) Personal Privacy complaint concerned the failure of TCEQ's predecessor agencies to take into account during the permitting process the additional risks and pollutant burdens on the nearby community that the proposed AEI incinerator would present. At the time of the permitting (1993), TCEQ's air permitting program considered the impacts of the individual facility on the surrounding area, but did not expressly require or allow consideration of the effect of facility-specific emissions in conjunction with those from other facilities in determining appropriate emissions limits or controls.[194] As discussed in Section V.A, above, Section 1.12 of H.B. 2912 (signed by the Governor on June 15, 2001 and effective September 1, 2001) provided new authority and expressly directed TCEQ to develop a program to address concerns of "cumulative impacts" from multiple sources of pollutants, and to focus particular attention and resources in areas with large numbers of facilities and a concomitant pollutant burden. Specifically, this new authority provides in full:

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[194] Letter from Albert M. Bronson and Amanda E. Atkinson, Assistant Attorneys General, Office of the Attorney General, Texas, to Dan Rondeau, OCR Director (Aug. 4, 1991), at 9-11 (response to (b) (6) Personal Privac complaint).

SECTION 5.130. CONSIDERATION OF CUMULATIVE RISKS.
The commission shall:
(1) develop and implement policies, by specific environmental media, to protect the public from cumulative risks in areas of concentrated operations; and
(2) give priority to monitoring and enforcement in areas in which regulated facilities are concentrated.[195]

This new authority has not yet been fully implemented, and TCEQ is required to develop an implementation plan (to address and identify definitional considerations, data needs and analyses, and other necessary program components) for this new authority.[196]

In addition, as discussed in the previous subsection, TCEQ has also committed to work with EPA as the Commission incorporates the consideration of cumulative risks into its program.[197] With respect to the AEI permit, even though the facility was permitted in 1993, it has never been built; consequently, there have been no actual emissions or exposures from the facility (and, therefore, there have been *no* actual health impacts on nearby residents). The facility's permit was issued in May 1993, and under Texas law will expire in May 2003; a renewal application must be issued at least 90 days prior to expiration, or by March 2003. To date, no permit renewal application has been submitted.[198]

2. Garden Valley Neighborhood Association – Cumulative Impacts

Similar to (b) (6) Personal Privacy complaint, the Garden Valley complaint concerned the failure of TCEQ to take into account during the permitting process the additional risks and pollutant burdens on the nearby community that the proposed Sakrete facility would present, in conjunction with emissions from other facilities. Only facility-specific emissions were taken into account during permitting, and TCEQ's response to the complaint likewise did not address the concern about cumulative impacts.[199] As noted above, while TCEQ did not have the express authority to take cumulative impacts into account during the time that the facility was permitted

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[195] H.B. 2912, § 1.12 (signed June 15, 2001, effective September 1, 2001), adding new 30 TEX. WATER CODE § 5.130.

[196] TNRCC Public Participation Response at 23.

[197] *Id.* at 24. *See also* Agreement between the Texas Commission on Environmental Quality and the United States Environmental Protection Agency, ¶ 8(A) (attached to this Investigation Report) [hereinafter cited as "TCEQ-EPA Title VI Agreement"].

[198] The facility's permit, No. H50299 (registration number 38720, EPA ID No. TXD982562787), was issued May 26, 1993, and will expire in May 2003. Under 30 TEX. ADMIN CODE § 116.315(a), the renewal application must be issued at least 90 days prior to expiration, or by March 2003.

[199] *See* Section III.B, *supra*.

(1994), in 2001 TCEQ was provided with new authority to take cumulative impacts into account.

An EPA assessment of the potential cumulative impacts from the Sakrete facility, completed as part of a related investigation, indicated that emissions were sufficiently low – largely at or below *de minimis* levels – such that there was no evidence of adverse impact to nearby residents.[200]

3. MOSES – Use of Evidence of Violations Provided by the Public

One of the allegations made by MOSES in its complaint regarding TCEQ's enforcement practices at the former American Envirotech (Gibraltar) facility in Winona, Texas, was the Commission's failure to include or rely on evidence of violations provided by residents living nearby the facility in any of the enforcement actions that were brought against the facility by TCEQ. TCEQ's practice at the facility was, in response to complaints and information provided by citizens, to send inspectors to the facility to gather their own evidence, and on occasion to conduct formal inspections, record reviews, etc. of the facility's operations, but TCEQ did not cite or otherwise use any evidence of violations that had been supplied by local citizens in any of the various enforcement actions it took during the 1980s and 1990s.[201]

In 2001, the Texas legislature authorized a modification of this practice by expressly enabling TCEQ to use evidence and information provided by members of the public in an enforcement action. Section 1.24 of H.B. 2912 added a new section to the Texas Water Code, which provides in full:

> SEC. 7.0025. INITIATION OF ENFORCEMENT ACTION USING INFORMATION PROVIDED BY PRIVATE INDIVIDUAL.
>
> (a) The commission may initiate an enforcement action on a matter under its jurisdiction under this code or the Health and Safety Code based on information it receives from a private individual if that information, in the

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[200] U.S. EPA Office of Civil Rights, Investigative Report for Title VI Complaint File No. 3R-94-R6 (Dec. 9, 2002).

[201] U.S. Environmental Protection Agency, Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-94-R6 (Dec. 9, 2002). It should be noted that MOSES had also complained that it had not been allowed any "meaningful participation" in enforcement against the Gibraltar facility, specifically pointing to the State's opposition to MOSES's intervention in the State-initiated enforcement action, although MOSES's intervention was granted by the court. Since that time, and with respect to this specific issue when raised in connection with the approval of the Texas NPDES program, EPA concluded that "Texas has elected, in accordance with 40 CFR 123.27, to provide for public participation in enforcement actions by providing assurances that it will [inter alia] *not oppose permissive intervention*. . . . TNRCC has procedures and/or enacted regulations to implement all of these requirements. (See 30 TAC 80.105, 109, and 254; see also Texas Water Code Ann. Sec. 5.177 for complaint process)." State Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas, 63 *Fed. Reg.* 51163, 51169 (Sept. 24, 1998) (emphasis added).

commission's judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action.

(b) The executive director or the executive director's designated representative may evaluate the value and credibility of information received from a private individual and the merits of any proposed enforcement action based on that information.

(c) The commission by rule may adopt criteria for the executive director to use in evaluating the value and credibility of information received from a private individual and for use of that information in an enforcement action.

(d) A private individual who submits information on which the commission relies for all or part of an enforcement case may be called to testify in the enforcement proceedings and is subject to all sanctions under law for knowingly falsifying evidence. If the commission relies on the information submitted by a private individual to prove an enforcement case, any physical or sampling data must have been collected or gathered in accordance with commission protocols.[202]

This new authority enables TCEQ to use citizen-generated evidence in its enforcement actions, and puts it on a par with evidence the Commission would gather or generate on its own (including adherence to chain of custody procedures and other requirements applicable to any evidence to be used to support an enforcement action). Consistent with principles of prosecutorial discretion, this new law does not *require* use of citizen-generated evidence (in the same manner that evidence gathered by TCEQ ultimately may not be used in an enforcement action); however, TCEQ guidelines provide that the person providing the evidence or information would be notified of the Commission's decision.[203]

Also as discussed in Section V.D.5, above, Section 1.24 of H.B. 2912 provided new authority for TCEQ that expressly authorized the Commission to "initiate an enforcement action on a matter under its jurisdiction under this code or the Health and Safety Code based on information it receives from a private individual," provided it meets standards of credibility and admissibility to support its introduction into court as evidence.[204] This new authority allows TCEQ to change its practice of relying solely on evidence it gathers through its own inspections, data collection efforts, etc. TCEQ has issued implementing regulations for this new authority,[205]

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[202] H.B. 2912, § 1.24 (signed June 15, 2001, effective September 1, 2001), adding new 30 TEX. WATER CODE § 7.0025; *see* 30 T.A.C. § 70.4 (implementing regulations).

[203] Do You Want to Report an Environmental Problem? Do You Have Information or Evidence? (GI-278, rev. Dec. 2001), at 2 ("How will I know what you decided?").

[204] TEX. WATER CODE § 7.0025.

[205] 30 TEX. ADMIN. CODE § 70.4 (effective Dec. 11, 2001).

and has also issued guidelines (in hardcopy form in both English and Spanish,[206] and on the Internet[207]) for citizens to inform them of their ability to report violations and submit supporting evidence. There are additional guidelines and information on the protocols for collecting and presenting evidence, to help ensure its usability in support of an enforcement action.[208]

An EPA assessment of impacts from the operation of the Gibraltar facility, completed as part of a related investigation, indicated that there was no violation of Title VI by TCEQ in this matter.[209] However, as part of the "broad based" investigation, EPA identified generalized concerns about slow or ineffective responses to citizen complaints about problems at facilities,[210] as well as concerns about the practical ability of citizens to provide evidence that would qualify for use by TCEQ in an enforcement action (due to technically difficult and complex evidentiary requirements, despite TCEQ guidances).[211] Although these general concerns are not associated with any specific complaint, TCEQ has nevertheless agreed to establish a process for evaluating its program for the reporting of violations and submission of evidence by members of the public.

4. PACE (Corpus Christi) – Informing Public of Environmental Concerns/Cumulative Impacts

Cumulative Impacts. PACE's complaint concerned, in part, the failure of TCEQ to consider the cumulative effect of permitting facilities in the Corpus Christi area, starting in 1994. As discussed in connection with the [redacted] and Garden Valley complaints, express authority for TCEQ to consider cumulative impacts was provided by the Texas legislature in 2001. The

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[206] Do You Want to Report an Environmental Problem? Do You Have Information or Evidence? (GI-278, rev. Dec. 2001).

[207] *See* "Guidelines for Gathering and Preserving Information and Evidence Showing a Violation," at http://www.tnrcc.state.tx.us/enforcement/protocols/evi_proto.html.

[208] *See, e.g.,* Surface Water Quality Monitoring Procedures Manual (GI-252, June 1999); Private Well Disinfection and Water Sampling (GI-005, rev. June 2001). Others are listed on the "Guidelines for Gathering and Preserving Information and Evidence" webpage, *supra* note [previous to this one], including use of photographic evidence, odor complaints, chain of custody procedures, and others critical for ensuring the adequacy and reliability of evidence used in court.

[209] U.S. Environmental Protection Agency, Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-94-R6 (Dec. 9, 2002) (lack of disparity; Letter of Concerns issued).

[210] Houston Citizen Interview. Similar concerns were identified in a separate investigation, as well. *See* U.S. Environmental Protection Agency, Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-94-R6 (Dec. 9, 2002).

[211] Interview with [redacted] (June 26, 2002). It should be recognized, however, that the guidelines are intended to ensure that citizen-provided evidence will be admissible in court, which as a practical matter requires satisfaction of the same chain of custody and other technical and legal requirements applicable to evidence obtained directly by TCEQ.

permitting complained of in this matter (of facilities located in the Corpus Christi area) was undertaken prior to this time, and there is no evidence in the record indicating that cumulative impact analyses were performed as a routine part of the permitting process (although it does appear that *ambient* air conditions were taken into account in the Corpus Christi area in at least some instances[212]). However, as noted above, TCEQ now has express authority to consider cumulative inpacts, and has committed to work with EPA in taking cumulative impacts into account in its program.

Informing the Public. PACE's complaint also alleged a failure on the part of TCEQ to inform the public of environmental concerns, or to assist them in participating in the permitting process. The record in this case tends to militate against this conclusion, however. At least partly in response to public concerns raised during permitting of facilities in the Corpus Christi area, there were some efforts by TCEQ to provide additional outreach, pollutant monitoring, and public involvement specifically focused on the Corpus Christi area.[213] While TCEQ did undertake some efforts to educate and inform the community, the Commission did not go so far (as PACE alleged it should have) to provide residents with "resources to protest permit renewals" (such as the retention of experts), to "relocate [the public] from the polluted sites," nor (other than education and outreach) to provide "access to the political process"[214] beyond that provided to the public generally.

Since the time that the PACE complaint was filed in 1995, and as discussed in Section V.B above, TCEQ's program now includes a range of public education and outreach activities, principally through the Office of Public Assistance and the Environmental Equity program (first established in 1993, as noted above, and later expanded upon). The activities of the Office of

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[212] Memorandum from Ruben Herrera, New Source Review Program,. Permitting Division, Office of Air Quality, TNRCC, to Steven J. Rembish and Maria Aponte-Pons, Toxicology & Risk Assessment Section, Air Quality Enforcement Division, Office of Air Quality, TNRCC, *Health effects review of modeled impacts of emissions from Coastal Refining & Marketing Inc., Corpus Christi, Nueces County (Permits #3477A, #3506A, #3783A and #3784A* (Sept. 29, 1994); Memorandum from J. Torin McCoy, Toxicology & Risk Assessment Section, Air Quality Enforcement Division, Office of Air Quality, TNRCC to Carlton Stanley, Manager, Region 14, Corpus Christi, *Health Effects Review of Ambient Air Sampling for Volatile Organic Compounds, Hydrogen fluoride, and Sulfur Compounds, Conducted by a Mobile Laboratory Trip in Corpus Christi, Nueces County (February 19-15, 1994)* (Mar. 10, 1995) (assessing pollutants downwind of the Coastal East and Citgo/Southwestern facilities).

[213] *See, e.g.,* Texas Water Commission News Release, "TWC Announces Groundwater Investigation" (Apr. 12, 1993) (describing ongoing groundwater sampling and monitoring efforts in Corpus Christi); Memorandum from Maria Aponte-Pons, Toxicology & Risk Assessment Section, Air Quality Enforcement Division, Office of Air Quality, TNRCC to Carlton Stanley, Manager, Region 14, Corpus Christi, *Toxicological Evaluation of Ambient Air Samples Taken by a Citizen at 4109 Gibson Lane, Oak Park Neighborhood, Corpus Christi, Nueces County (ACLs # 9181 and 9207)* (Jan. 4, 1995); *Oak Park, Corpus Christ Refineries Site Investigation Summary*, in Texas Department of Health, Bureau of Epidemiology Annual Report (1996) (study undertaken by Texas Department of Health of Corpus Christi residents at the request of TNRCC). *See also* Section III.D, *supra*.

[214] Letter from Grover G. Hankins, Esq. and Neil J. Carman, Ph.D. (on behalf of PACE and AGIT), to Daniel J. Rondeau, Director, EPA Office of Civil Rights (Nov. 16, 1994).

Public Assistance, Environmental Equity program, and Public Interest Counsel have served to "regularize" the assistance, outreach and advocacy services provided by TCEQ that were not generally provided (if at all) prior to the formation of these units. In addition to the summary presentations of the permitting process and public involvement opportunities provided at permit meetings, extensive materials are provided on-line and in hard-copy format (in both Spanish and English). Other avenues for public assistance and education are provided, but which require an interested person to affirmatively seek out TCEQ-provided resources and materials. These were not generally available (or only available to a limited extent when the complaint was filed in 1995).

Accordingly, there are now in place regular mechanisms to provide interested members of the public with such information and materials, either on request or during public meetings on permit applications, that were not generally available during the period complained of by PACE. In addition, it also appears that there were targeted efforts at outreach and assistance in the Corpus Christi area, even though these were not apparently parts of TCEQ's regular program at that time. In addition, while TCEQ does not provide persons seeking to challenge a permit with an array of resources for them to use at their discretion (*e.g.*, counsel, expert witness(es) and testimony, etc.), it does have a mechanism for the routine advocacy of the public interest at large, through the Public Interest Counsel, in permit proceedings.

However, as discussed in Section V.C above, while a program and supporting structure now appears to be in place, the delivery of this part of TCEQ's services appears to be uneven, which may result in inconsistent or incomplete outreach, thereby impeding the effectiveness of the program. In particular, the efforts of the Environmental Equity program and Public Interest Counsel were characterized as remaining ineffective in the Corpus Christi area (specifically, that there is not nor has input been sought from the community, and that the Public Interest Counsel is unable to be a "staunch" advocate by virtue of being a part of TCEQ).[215] While this raises a question about the *effectiveness* of TCEQ's ability to deliver on its programmatic objectives to work with affected and interested communities, and of the *effectiveness* of its public advocacy function, as noted above in Section VI.B, TCEQ has committed to undertake an assessment of the effectiveness of its outreach and public education activities, as well as of its response to concerns raised during permitting about exposure to facility-specific and cumulative emissions.[216]

5. PODER – Denial of Notice and Opportunity to Participate in Permitting/Access to Information/Cumulative Impacts

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[215] Letter from Grover G. Hankins, Hankins Law Firm, to John Fogarty, EPA Title VI Task Force (Sept. 11, 2002), at 2. This characterization is somewhat at odds with the observations of other members of the public, which viewed the Public Interest Counsel as an aggressive advocate, but that it was underfunded and unable to match the resources of well-heeled permit applicants. Houston Citizen Interview.

[216] TCEQ-EPA Title VI Agreement, ¶ 8(A)-(B).

PODER's allegation complained that the ability of citizens to meaningfully participate in permit actions was denied by TCEQ (1) through its practice of approving contested permits prior to the resolution of appeals to the Attorney General for information withheld from the public as confidential, and (2) through the use of "standard exemptions," which do not require a public permitting process. The use of standard exemptions was also alleged to result in cumulative impacts.

Denial of Public Information. With respect to the allegation that meaningful participation in the permitting process was denied through the practice of granting permits before the resolution of appeals for information with as confidential, on appeal the information PODER claimed to be public was found to be confidential and not releaseable to the public.[217] Prior to this ruling, however, the permit application had been withdrawn, ending the contested permitting process in 1996. Nevertheless, in 1999 TCEQ formally adopted a "Confidentiality Policy" changing the complained of practice.[218] Specifically, the 1999 Confidentiality Policy provides that when a public information request is received "during a time-sensitive period (such as a 30 day public comment period)" for information claimed to be confidential, "the agency *will suspend* the processing of the [permit] application" until the Attorney General issues an opinion on the claim of confidentiality.[219]

Denial of Process. With respect to the allegation that the use of standard exemptions denies the opportunity for public notice and the permitting process, with few exceptions no member of the public nor TCEQ as a regulator would receive notice of a facility's use of a standard exemption – a standard exemption operates as an *exemption* from the permitting process, meaning that no regulatory action (e.g., application, review or approval) is typically undertaken with respect to a facility's claim or use of an exemption. As described and discussed above in Section V.A, the previous system of "standard exemptions" applied to emissions and facilities that are considered to contribute *de minimis* emissions, and thus are below a level of regulatory interest (*i.e.*, a facility-specific permit or controls are not necessary because the emissions are sufficiently low).

However, and subsequent to the filing of the complaint, the system of standard exemptions was modified from exemptions to "permits-by-rule," thereby bringing them within the ambit of the permitting program (although permits-by-rule still function similarly, in that with few exceptions no notice is required, nor is a formal permit issued). Provisions of H.B. 2912 required that all existing non-permitted facilities obtain one of several new classes of

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[217] Letter from Loretta R. DeHay, Assistant Attorney General, to Kevin McCalla, Director, TNRCC Legal Division (May 7, 1997) (Attorney General's "letter ruling" finding that information sought were protected trade secrets under Texas law).

[218] Memorandum from Duncan C. Norton, General Counsel, TNRCC, to Jim Phillips, Deputy Director, Office of Legal Services, TNRCC, *Confidentiality Policy* (Oct. 28, 1999).

[219] *Id.* (emphasis added).

permit, to meet the requirements of a permit-by-rule, or to cease operations.[220] While these new requirements restrict the availability of permits-by-rule (requiring facilities that would have previously been able to claim a standard exemption/permit-by-rule to undergo formal permitting), no notice to TCEQ or the public is ordinarily required a facility validly operating under a permit-by-rule,[221] nor is a public notice-and-comment permit process required in every case.

With respect to the Tokyo Electron facility, subsequent to the action complained of in this matter,[222] the facility's regulatory status was changed. In April 2002, following regular public notice-and-comment proceedings, an air quality permit requiring the use of air scrubbers and setting operational and emission limitations was issued to the Tokyo Electron facility.[223]

Cumulative Impacts. With respect to the concern raised in the complaint regarding the use of standard exemptions (*viz.*, concerns regarding the level of pollutants emitted by facilities operating under one or more standard exemptions, both on a facility-specific basis and from their cumulative impact), TCEQ has begun a process of systematically reviewing existing standard exemptions/permits-by-rule standards, to determine if revisions to emission levels or other requirements are necessary.[224] In addition, and as discussed above, at the time of the actions complained of in this case, the Commission did not have express authority to take cumulative impacts into account in its program; TCEQ now has express authority to consider cumulative inpacts, and has committed to work with EPA in taking cumulative impacts into account in its program. TCEQ has also committed, as noted in Section VI.B above, to undertaking an assessment of the protectiveness of "priority" permits-by-rule leels, and to work with EPA Region VI to address the matter of cumulative impacts.

6. PACE (Beaumont) – Denial of Notice and Public Participation

PACE alleged that its opportunity for a contested case hearing for a modification to allow an upgrade to the "hydrocracker" unit at the Exxon-Mobil facility in Beaumont was denied on the basis that TCEQ "chose" not to require the facility to go through the "normal" public notice

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[220] 5 TEX. HEALTH & SAFETY CODE §§ 382.05181 - 382.05186.

[221] Registration of permits-by-rule is encouraged, although not required in most cases, by filing a "Registration For Permits By Rule Form PI-7" (TNRCC - 10228, rev. 4/20/02).

[222] As noted above, the Tokyo Electron facility at first filed, and then withdrew, a permit application, relying instead on a standard exemption.

[223] TNRCC Air Quality Permit No. 49507 (approved Apr. 18, 2002).

[224] *See* Section V.A, *supra*.

and comment procedures applicable to permits.[225] PACE contended that it was unable to request a contested hearing because TCEQ only provided a single notice and public meeting of the proposed permit amendment, and did not provide a second notice (at which time PACE would have requested a contested hearing).

The permitting and public participation requirements applicable to permit amendments and modifications in which no new pollutants are emitted, and in which there is no change (or a decrease) in emissions, vary from those applicable to "normal" permit procedures. Specifically, for permit amendments or renewals in which there is no increase in emissions, public notice is required[226] and is followed by a 30-day notice and comment period.[227] By statute, however, TCEQ "may *not* seek *further* public comment or hold a public hearing under the procedures provided by [this section] in response to a request for a public hearing on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted."[228] In this case, because the emission reductions were treated as offsets, no second notice or hearing is provided for under Texas law,[229] and none was provided for the permit amendment.

TCEQ did not "choose" not to provide a second notice or opportunity for a hearing – none is provided for by statute. At the core of PACE's complaint, however, is that there *should* have been a second notice and opportunity for a hearing because the emission reductions relied on to offset the increased emissions from the hydrocracker unit that was the subject of the permit action should *not* have been allowed. In other words, because emissions from the hydrocracker unit increased as a result of the upgrade, and the emissions reductions elsewhere at the facility were improperly credited as offsets, PACE contended that a full notice-and-comment process should have been provided.

As noted in Section II.F above, the "substantive" allegation that emission increases from the facility have resulted in adverse impacts to the surrounding community is being handled separately (at the time of this investigation, the option for a mutually agreeable resolution

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[225] Letter from Rev. Roy Malveaux, Executive Director, PACE, and Niel J. Carman, Ph.D., Clean Air Program Director, Lone Star Sierra Club, to Eva Hahn, EPA Title VI Task Force (Nov. 29, 2001), at 2 [hereinafter cited as "November PACE Letter"].

[226] 5 TEX. HEALTH & SAFETY CODE § 382.056.

[227] 30 TEX. ADMIN. CODE § 55.12 (applicable to permits prior to September 1, 1999; similar provisions at 30 TEX. ADMIN. CODE § 55.152 are applicable to permits after this date).

[228] 5 TEX. HEALTH & SAFETY CODE § 382.056(g). *See also* 30 TEX. ADMIN. CODE § 39.419(e)(1)(C) (similar provision, noting a limited exception for a facility with a poor compliance history).

[229] *Id.*

through Alternative Dispute Resolution is being explored[230]); this investigation is concerned solely with the "procedural" allegation that PACE's opportunity for public participation was denied. However, the two issues are inextricably linked: the procedural question of whether there should have been a second notice and hearing turns on the substantive question of whether the emission reductions elsewhere at the facility that used as offsets were properly creditable. With respect to this question, PACE has asserted that the reductions were not creditable because those reductions were "federally required."[231] However, emission reductions that may have resulted from compliance with Maximum Achievable Control Technology (MACT) requirements under the Clean Air Act may be used as offsets.[232] In other words, with few exceptions, just because emission reductions at the Exxon-Mobil facility may have been required by federal law does not necessarily make them unavailable as offsets for the hydrocracker permit.

VII. ANALYSIS AND RECOMMENDED DETERMINATION

A. (b) (6) Personal Privacy

The permitting procedures and authorities of TCEQ and its predecessor agencies did not include the authority to consider or address cumulative risks or impacts resulting from the emissions from a facility to be permitted, in conjunction with those from other facilities at the time this complaint was filed. As a result, at the time the proposed American Envirotech facility was being permitted there was no assessment or consideration of the impact of the facility's anticipated emissions in conjunction with those from other facilities in the area. However, even though the facility was permitted in 1993, it has never been built; consequently, there have been no actual emissions or exposures from the facility, and therefore no impacts on nearby residents as a result of the facility's permitting.[233]

TCEQ's program has since been amended to include new authority to take cumulative impacts into account. The addition of this new authority effectively addresses the alleged

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[230] Letter from W. Robert Ward, Director, EPA Conflict Prevention and Resolution Center to Robert J. Huston, TCEQ Chairman (Mar. 22, 2002).

[231] Letter from Roy Malveaux, Executive Director, PACE and Neil Carman, Clean Air Program Director, Lone Star Chapter Sierra Club to Eva Hahn, EPA Title VI Task Force (Nov. 29, 2001), at 2 (TCEQ "circumvent[ed] the [notice-and-comment] process through the inappropriate use of mainly federally required refinery emission decreases as offsets").

[232] *See generally* Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, U.S. EPA Office of Air and Radiation, to Bob Hannesschlager, Acting Director, Multimedia Planning and Permitting Division, U.S. EPA Region VI (Nov. 12, 1997).

[233] As discussed above, the facility's permit, No. 50299 (registration number 38720, EPA ID No. TXD982562787), was issued May 26, 1993, and will expire in May 2003. Under 30 TEX. ADMIN CODE § 116.315(a), the renewal application must be issued at least 90 days prior to expiration, or by March 2003. To date, no permit renewal application has been submitted.

deficiency in TCEQ's program identified in the complaint. In addition, TCEQ has also committed to work with EPA Region VI as TCEQ begins to implement this new authority.

To the extent that TCEQ's failure to take cumulative impacts into account could have resulted in a violation of Title VI of the Civil Rights Act and 40 C.F.R. Part 7, legal barriers which may have precluded TCEQ from doing so have since been removed. Accordingly, it is therefore recommended that, based on the lack of an adverse impact and as the result of changes to TCEQ's program subsequent to the filing of the complaint, the complaint in this matter be dismissed.[234]

B. Garden Valley Neighborhood Association

As noted in Section VII.A, above, the permitting procedures and authorities of TCEQ did not include the authority to consider or address cumulative risks or impacts resulting from the emissions from a facility to be permitted in conjunction with those from other facilities at the time this complaint was filed. As a result, at the time the TXI Sakrete facility was being permitted, there was no assessment or consideration of the impact of the facility's anticipated emissions in conjunction with those from other facilities in the area. (However, EPA's own analysis indicated that emissions from the TXI facility, alone and in combination with pollutants from other sources, were unlikely to pose a health risk to residents of the Garden Valley neighborhood.[235])

Also as noted above, TCEQ's program has since been amended to include new authority to take cumulative impacts into account, and TCEQ has also committed to work with EPA Region VI as TCEQ begins to implement this new authority. To the extent that TCEQ's failure to take cumulative impacts into account could have resulted in a violation of Title VI of the Civil Rights Act and 40 C.F.R. Part 7, legal barriers which may have precluded TCEQ from doing so have since been removed. Accordingly, it is therefore recommended that, based on the lack of an adverse impact and as the result of changes to TCEQ's program, the complaint in this matter be dismissed.[236]

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[234] 40 C.F.R. § 7.115(g). In addition, 40 C.F.R. §§ 7.120(d)(2) provides for an informal resolution and dismissal based on, *inter alia*, the implementation by recipients of measures to reduce or eliminate alleged disparate impacts, including those agreed to be implemented in the future. *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 *Fed. Reg.* 39667, 39673-74, 39683 (June 27, 2000) (resolution of complaints may be based on a recipient's having undertaken or agreed to measures that reduce or eliminate the disparate impacts complained of).

[235] *See* Memorandum to Loren Hall, EPA Title VI Task Force, from Ed Carr, Arlene Rosenbaum and Puttanna S. Honaganhalli, ICF Inc., "Initial Adverse Impact Evaluation for Complaint 03R-94-R6 submitted by Garden Valley Neighborhood Association: EPA Contract No. 68-09-9019, Work Assignment 2-2" (November 11, 2002) *and* U.S. Environmental Protection Agency Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 3R-94-R6 (Garden Valley Citizens Association Complaint) § V.3.

[236] *See* note 234, *supra*.

C. MOSES

At the time the MOSES complaint was filed, there was no express authority for TCEQ to cite, use or rely on evidence of violations generated by citizens, and no evidence of violations at the former Gibraltar facility that had been provided by residents living nearby was used in any enforcement actions taken or initiated by TCEQ (while no citizen-generated evidence was used by TCEQ, enforcement actions were initiated for violations complained of by residents living nearby the facility[237]).

Since the time that the Gibraltar facility was in operation (it closed in 1997), new legislative[238] and regulatory authority[239] has been promulgated that clearly establishes the ability of TCEQ to bring enforcement actions based, in whole or in part, on evidence supplied by members of the public. Outreach and guidance to encourage the use of this new authority, and guidelines for ensuring that information provided under this authority will be of sufficient rigor and quality to be introduced into court as evidence, has likewise been provided.[240] Therefore, to the extent that TCEQ's failure to use, cite or rely on evidence of violations provided by members of the public could have violated Title VI of the Civil Rights Act and 40 C.F.R. Part 7, legal barriers which may have precluded TCEQ from doing so have since been removed. Accordingly, it is therefore recommended that, based on the lack of disparity and as the result of changes to TCEQ's program, the complaint in this matter be dismissed.[241]

D. PACE (Corpus Christi)

Cumulative Impacts. As noted in the preceding subsections, TCEQ's permitting procedures and authorities did not include the authority to consider or address cumulative risks or impacts resulting from the emissions from a facility to be permitted in conjunction with those from other facilities at the time this complaint was filed. At the time of the permitting complained of in this matter, TCEQ did not undertake an assessment nor did it consider the impact of an individual facility's anticipated emissions in conjunction with those from other

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[237] *See* U.S. Environmental Protection Agency Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-94-R6 (MOSES Complaint) §§ V.B, VI.B (discussing enforcement response).

[238] TEX. WATER CODE § 7.0025.

[239] 30 TEX. ADMIN. CODE § 70.4.

[240] *See, e.g.*, Do You Want to Report an Environmental Problem? Do You Have Information or Evidence? (GI-278, rev. Dec. 2001); "Guidelines for Gathering and Preserving Information and Evidence Showing a Violation," at http://www.tnrcc.state.tx.us/enforcement/protocols/evi_proto.html.

[241] *See* note 234, *supra*. Note also that the result of a related investigation was that there was no violation with respect to the MOSES complaint due to a lack of disparity, making dismissal of this allegation appropriate on this basis, as well. U.S. Environmental Protection Agency, Office of Civil Rights, Investigative Report for Title VI Administrative Complaint File No. 5R-94-R6 (Dec. 9, 2002).

facilities in the area, although some ambient monitoring data was considered. As discussed above, TCEQ's program has since been amended to include this authority, and TCEQ has also committed to work with EPA Region VI as TCEQ begins to implement this new authority.

To the extent that TCEQ's failure to take cumulative impacts into account in the permitting of facilities in Corpus Christi could have violated Title VI of the Civil Rights Act and 40 C.F.R. Part 7, legal barriers which may have precluded TCEQ from doing so have since been removed. Accordingly, it is recommended that it is therefore recommended that, based on the lack of evidence to support the allegation and as the result of changes to TCEQ's program, the allegation of discrimination concerning cumulative impacts in this case concerning cumulative impacts is therefore recommended to be dismissed.[242]

Informing the Public. With respect to the allegation regarding a failure to inform the public of environmental concerns and hazards, or to engage in outreach and education, the record indicates that TCEQ engaged in extensive efforts to identify problems, inform the public (including multiple public meetings and door-to-door health studies), and provide additional services to potentially affected residents (such as blood screenings). In addition, and as discussed in detail in the preceding sections, TCEQ has established several programs designed to provide for outreach and education, to enhance public participation and awareness, to provide for and has further committed to evaluate and address any root cause(s) or impediments to the delivery of these services to the community. Accordingly, the evidence does not support a finding that TCEQ made no effort to inform the community of environmental hazards or conduct groundwater sampling or monitoring, as alleged by complainants in this matter. Similarly, the evidence indicates that TCEQ provides a range of assistance and other measures to enable residents to be aware of, participate, and challenge proposed permit decisions, or to otherwise have their interests represented during the permitting process.

Therefore, to the extent that TCEQ's outreach, education and assistance efforts in this matter could have resulted in a violation of Title VI of the Civil Rights Act and 40 C.F.R. Part 7, it is recommended that, based on the lack of evidence to support the allegation as the result of changes to TCEQ's program, the complaint in this matter be dismissed.[243] In addition, while the "broad based" investigation indicated that there are some questions about the effectiveness of these measures in the field, TCEQ has committed to assess and evaluate its education and outreach efforts, which will inform future decisions on any necessary changes or improvements.

E. PODER

Cumulative Impacts. The permitting procedures and authorities of TCEQ did not include

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[242] *See* note 234, *supra.* The separate allegation regarding a failure to enforce by TCEQ is handled separately, and is not affected by this recommendation.

[243] *See* note 234, *supra.*

the authority to consider or address cumulative risks or impacts resulting from the emissions from a facility to be permitted in conjunction with those from other facilities at the time this complaint was filed. There is no evidence that TCEQ considered the cumulative impact of emissions from facilities that were the subject of the permitting action complained of in this matter. TCEQ's program has since been amended to include this authority, and TCEQ has also committed to work with EPA Region VI as TCEQ begins to implement this new authority. To the extent that TCEQ's failure to take cumulative impacts into account may have violated Title VI of the Civil Rights Act and 40 C.F.R. Part 7, legal barriers which may have precluded TCEQ from doing so have since been removed. Accordingly, it is recommended that the allegation of discrimination with respect to the failure to consider cumulative impacts is matter is resolved as the result of changes to TCEQ's program, and the complaint in this matter is therefore recommended to be dismissed.[244]

Denial of Public Information. With respect to the allegation of discrimination stemming from the issuance of permits prior to the resolution of appeals for information withheld as confidential, in this case the permit application was withdrawn (ending the permit proceedings), and the information sought was subsequently held to be confidential "trade secrets," and not public information. Accordingly, the facts indicate that there was no denial of public information in this case, in part because the information was not public. However, as a direct result of the filing of the complaint,[245] TCEQ subsequently revised its procedures and will now suspend processing of permits while a determination and appeal for information claimed confidential is pending.[246] Therefore, while no public information was withheld under TCEQ's former practice in this case, to the extent that on different facts TCEQ's processing of permits while appeals for information was pending could violate Title VI of the Civil Rights Act and 40 C.F.R. Part 7, the practice has since been amended to preclude this result. Accordingly, it is recommended that the allegation of discrimination in this matter is resolved both because the evidence does not support a finding of violation, and as the result of changes to TCEQ's program; the complaint is therefore recommended to be dismissed.[247]

Denial of Process. With respect to the allegation that TCEQ's use of standard exemptions from permitting results in a discriminatory denial of notice and opportunity to comment or contest their use (the use of multiple standard exemptions was also alleged to result in cumulative impacts), the Tokyo Electron facility that was the subject of the complaint filed in

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[244] *Id.*

[245] Letter from David D. Duncan, Senior Attorney, Environmental Law Division, TNRCC, to Anne E. Goode, Director, EPA Office of Civil Rights (Apr. 30, 1999), at 12.

[246] *Id.* (emphasis added).

[247] *See* note 234, *supra.*

this matter has since been permitted through the standard notice-and-comment process.[248]

In addition, the system of standard exemptions has been replaced by a new "permit by rule" system. Although the full notice-and-comment process is not required where a facility operates under a "permit by rule," registration (notice) of the facility's authorized *de minimis* emissions under a permit by rule, while not required in every case, is necessary in order to obtain TCEQ's review and approval,[249] and public notice is required in some circumstances.[250] In addition, if a permitted facility also makes use of a permit by rule for one or more of its emissions, the permit by rule limitations are made part of the facility's air permit.[251] TCEQ has also undertaken an effort to review and revise the *de minimis* emission levels authorized under the permit-by-rule system to determine their ongoing protectiveness, and has committed to a schedule for assessing the protectiveness of "priority" pollutants.[252] Therefore, to the extent that the use of standard exemptions at the Tokyo Electron facility may have resulted in a violation of Title VI of the Civil Rights Act and 40 C.F.R. Part 7 by TCEQ, it is recommended that the allegation of discrimination in this matter is resolved as the result of the subsequently-issued permit and associated notice-and-comment process for the facility, and as the result of past changes to TCEQ's program with respect to the use of standard exemptions. The complaint in this matter is therefore recommended to be dismissed.[253]

F. PACE (Beaumont)

The opportunity for a contested case hearing with respect to a permit modification was alleged to be denied because TCEQ "chose" not to require the facility to go through "normal" public notice and comment procedures. However, a different set of public notice and hearing requirements apply to permit amendments and modifications in which no new pollutants are emitted, and in which there is no change (or a decrease) in emissions. By statute, TCEQ "may *not* seek . . . or hold a public hearing" where the amendment or modification would not change or increase emissions.[254]

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[248] TNRCC Air Quality Permit No. 49507 (approved Apr. 18, 2002).

[249] 30 TEX. ADMIN. CODE § 106.6.

[250] *Id.* § 106.5.

[251] Texas Commission on Environmental Quality, Registration for Permit By Rule Form PI-7 (Form PI-7 Instructions § III.G).

[252] TCEQ-EPA Title VI Agreement, ¶ 8(C). These "priority" pollutants are defined as those that require notification and registration with TCEQ. *See, e.g.*, 30 TEX. ADMIN. CODE § 106.261.

[253] *See* note 234, *supra.*

[254] TEX. HEALTH & SAFETY CODE § 382.056(g).

At the core of the complaint is PACE's disagreement that facility emissions were not considered to increase (or to decrease) for permitting purposes: while the increases associated with the installation and upgrade of a "hydrocracker" at the facility were considered to be offset by emissions reductions obtained at other units at the same facility, PACE contended that those offsets should not have been allowed because most of those reductions were "required" under a "voluntary" federal program.[255] The "substantive" question raised by the complaint – whether emission reductions elsewhere should have been considered to appropriately "offset" the emission increases associated with the hydrocracker – is being handled separately[256]; the "procedural" question (*i.e.*, whether an element of TCEQ's permitting and public participation process was improperly denied) turns on the outcome of the substantive question. In other words, *if* the offsets were appropriately included and no net increase (or decrease) in emissions would result from the permit amendment, the right to a contested case hearing would not have been denied because no hearing at all is provided for.[257] Conversely, *if* emissions were considered to increase under the permit amendment, the opportunity for a contested case hearing should have been made available.[258] In other words, the "procedural" issue is inextricably linked to the outcome of the "substantive" issue of facility emissions.

Accordingly, because the "substantive" question of the impact of potential emission increases at the facility is being handled separately, determination of the "procedural" allegation is conditioned on the outcome of the "substantive" matter: specifically, (1) if the emissions reductions were properly creditable, there is no procedural violation and, hence, no denial of process that would potentially violate Title VI; or (2) if the emission reductions were not properly creditable, then a procedural violations and a denial of process that would potentially violate Title VI.

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[255] November PACE Letter at 2-3.

[256] The use of alternate dispute resolution has been offered to both the complainants and the recipient in an effort to obtain a mutually acceptable agreement that resolves the allegation. Letters from W. Robert Ward, Director, Conflict Prevention and Resolution Center, EPA, to Robert J. Huston, Chairman, TNRCC, and to Rev. Roy Malveaux, Executive Director, PACE, Neil J. Carman, Ph.D., Clean Air Program Director, Sierra Club Lone Star Chapter, and Raul Alvarez, Environmental Justice Director, Sierra Club Lone Star Chapter (March 22, 2002).

[257] 5 TEX. HEALTH & SAFETY CODE § 382.056(g). Note also that EPA may dismiss a complaint in cases where "the permit action that triggered the complaint significantly decreases all pollutants of concern . . . ." Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 *Fed. Reg.* 39667, 39677 (Jun. 27, 2000).

[258] 5 TEX. HEALTH & SAFETY CODE § 382.056(g) ("If, in response to the [first] notice . . . for a permit or permit amendment [a person requests] that the commission hold a public hearing . . ., the applicant shall publish notice of the preliminary decision in a newspaper, and the commission shall seek public comment on the preliminary decision. The commission shall consider the request for public hearing under the procedures provided by [this section].").

Therefore, the following conditional finding is recommended: (1) this matter should be dismissed consistent with the outcome achieved by the ADR process concerning the substantive issue, or (2) if no mutually agreeable resolution is achieved through ADR, this matter should be addressed consistent with the final determination of EPA's investigation of whether the emissions reductions relied on as offsets were properly creditable (*i.e.,* dismissed if the offsets are determined to be creditable, or a finding of a procedural violation (no hearing) if the offsets are determined not to be creditable).

G. Conclusion

Having analyzed all the materials submitted and information gathered during the investigation of TCEQ's permitting and public participation program, and of the individual complaints, and in consideration of the agreement by which TCEQ has committed to undertake and implement specific measures relating to its permitting and public participation program, it is recommended that EPA not find any violations of Title VI and EPA's implementing regulations by TCEQ regarding the allegations described in Section II that were accepted for investigation in the following complaints: EPA File No. 2R-94-R6, No. 3R-94-R6, No. 5R-94-R6, No. 2R-95-R6, No. 1R-96-R6 and No. 1R-00-R6.